

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,837

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH W. ALLEN, et al.

vs.

SAMUEL SPENCER, RENAH F. CAMALIER, LOUIS W. PRENTISS,
Appellees.

Appeal from the United States District Court
for the District of Columbia

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED AUG 6 1953

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QUESTIONS PRESENTED

1. Are the procedures prescribed in Title 4-510, D. C. Code, 1940, for the retirement of members of the District of Columbia Police and Fire Departments mandatory in cases of retirement for age and length of service?
2. If the answer to the foregoing question is in the affirmative, are not the Orders of retirement of appellants for age and length of service legally invalid if such Orders were admittedly made without complying with the procedures prescribed in Title 4-510, D. C. Code, 1940?
3. If such Orders were legally invalid when made, can the Judgment of the Court below, denying the motion of appellants for summary judgment and granting the motion for summary judgment of appellees, be sustained on the ground of laches on the part of appellants?

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IN THE
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JOSEPH W. ALLEN, et als.,
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Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a final order and decision (Jt. App. 46) of the United States District Court for the District of Columbia in favor of appellees in an action for mandatory relief. The jurisdiction of the Court below was invoked under Title 28, Section 1331, of the United States Code. A review of the Judgment below by this

Court is authorized by Title 28, Section 1291, of the United States Code.

STATEMENT OF THE CASE

Appellants are former members of either the Police Department or Fire Department of the District of Columbia. With regard to each of them, the Commissioners of the District of Columbia have, on various dates from 1932 to 1947, entered general or special orders retiring them from active service for age and length of service and granting them relief from the Police and Firemen's Relief Fund, pursuant to Title 4-501, et seq., D. C. Code, 1940.

Contrary to the requirements of Title 4-510, D. C. Code, 1940, the Board of Police and Fire Surgeons did not administer a medical examination to either of the appellants herein at or about the dates of their respective retirement in order to ascertain their physical condition; the said Board of Police and Fire Surgeons did not certify the physical condition of any of them in writing to the Retiring and Relief Board: neither of appellants was given written notice by said Retiring and Relief Board to appear before it and give such evidence under oath as he might desire, and no such evidence was, in fact, given; the Retiring and Relief Board did not submit to the Commissioners of the District of Columbia a report of its findings, and the Commissioners of the District of Columbia did not approve, disapprove, or modify such findings of the Retiring and Relief Board (Jt. App. 3).

Subsequent to the effective dates of the Orders of Retirement aforesaid, in the course of the years 1948-1949, the omissions set forth in the preceding paragraph have been supplied and, with respect to each of appellants, the Retiring and Relief Board has found that at the time of retirement, appellants were suffering from physical dis-

ability incurred in the line of duty for which they might have been retired had they not been retired for age and length of service.

The Commissioners of the District of Columbia have approved such findings (Jt. App. 3, 14).

On February 6, 1952, appellants petitioned the Commissioners of the District of Columbia to reconsider their cases in the light of the fact, not considered theretofore at the time of retirement, that they were then disabled; to follow the procedure prescribed by Title 4-510, D. C. Code, 1940, for the purpose of such reconsideration; to determine whether, in the light of the record, as ultimately established, their retirement should have been for disability; and to frame orders for retirement for disability in those cases deemed proper by the Commissioners in the exercise of their statutory discretion, which orders shall incorporate the degree of disability and the grant of relief measured thereby, retroactively effective as of the date of actual retirement (Jt. App. 4).

On November 18, 1952, the Commissioners denied appellants' petition (Jt. App. 9).

This cause came on for hearing in the United States District Court for the District of Columbia upon a Complaint for Retirement and Motions for Summary Judgment filed by appellees and appellants herein. The Court below denied appellants' Motion, granted the Motion of appellees, defendants below, and entered final judgment thereon. (Jt. App. 46).

STATUTES AND RULES INVOLVED

This appeal involves the consideration and application of Title 4-510 (39 Stat. 719, c. 433, Sec. 12), D. C. Code, 1940; Rule 56 of the Federal Rules of Civil Procedure.

STATEMENT OF POINTS

1. The Court below erred in denying the motion of appellants, plaintiffs below, for summary judgment.
2. The Court below erred in granting the motion of appellees, defendants below, for summary judgment.
3. The Court below erred in entering its final judgment.

SUMMARY OF ARGUMENT

1. The procedure prescribed for the method of retiring members of the District of Columbia Police and Fire Departments by Title 4-510, D. C. Code, 1940, is mandatory.
2. Appellees' failure to abide by such mandatory procedure invalidates the Orders of Retirement of appellants entered pursuant to Title 4-501, et seq., D. C. Code, 1940, and appellants properly asserted their right to be retired in accordance with applicable law.
3. Appellants were diligent in seeking the mandatory relief to which they were entitled, and their motion for summary judgment should, therefore, have been granted.
4. If the affidavits and exhibits in the record be deemed to show the existence of a genuine issue as to a material fact on the question of laches, summary judgment in favor of appellees was improperly entered.

ARGUMENT

I

Title 4-510, D. C. Code, 1940 (Act of September 1, 1916, 39 stat. 719, Chapter 433, Section 12), requires the establishment in and for the District of Columbia of a board to be known as the Police and Firemen's Retiring and Relief Board, and provides that:

"The said board shall consider *all cases* for the retirement and relief of members of the police department and the fire department rendered necessary or expedient under the provisions of sections 4-501, 4-503, 4-506 to 4-510, 4-512 to 4-514, and *all applications* for the relief of widows, and children under sixteen years of age. *In every case* of retirement of a member of either of said departments the Board of Police and Fire Surgeons *shall certify*, in writing, to the said retiring and relief board the physical condition of the member for whom retirement and relief is sought. The said retiring and relief board *shall* give written notice to *any* member of said departments under consideration by it for retirement and relief to appear before the board and give such evidence under oath *as he may desire*, and the proceedings of the board *shall* be reduced to writing and *shall show* the date of appointment of such member, his age, his record in the service, and any other information that may be pertinent to the matter of his retirement and relief. The said board is authorized and empowered to summon any person before it to give testimony, under oath or affirmation, as to any matter affecting retirement and relief under the provisions of sections 4-501, 4-503, 4-506 to 4-510, 4-512 to 4-514; and any member of the board shall have power to administer oaths or affirmations to witnesses appearing before the said board. Such summons shall be served by any member of the Metropolitan police force, and upon the refusal or neglect of a witness to appear before the said board or to testify when required, he or she may be compelled to attend and testify as provided in sections 4-601 to 4-603, and any witness knowingly making a false statement to the said board on any material matter shall be guilty of perjury and punishable accordingly. The said retiring and relief board *shall in each case* considered by it for retirement and relief submit to the commissioners of the District of Columbia a report of the findings, and the said commissioners shall have power to approve, disapprove, or modify such findings or to remand any case for further proceedings as they may deem necessary." (*Italic supplied*)

The foregoing language is definite, unambiguous, and unequivocal, and negatives any speculation as to the existence of discretion on the part of the duly constituted authorities of the District of Columbia concerning the method and procedure to be followed in cases of retirement of any member of the Police and Fire Departments of said District. There is no dispute, and it is to be taken as admitted, that the prescribed procedure was entirely ignored by the Commissioners of the District of Columbia in respect to the retirement of each and every one of the appellants herein. They were retired by general or special orders, and their respective records conclusively demonstrate that preliminary to or at their retirement, the Board of Police and Fire Surgeons did not examine the physical condition of appellants and did not certify their medical findings, in writing, to the Retiring and Relief Board: appellants have not been notified to appear before the Retiring and Relief Board for the purpose of giving pertinent evidence; no such evidence was, in fact, given: no report of findings was submitted by said Board to the Commissioners, and the official action of the Commissioners in ordering the retirement of appellants was not based on—indeed, could have no relation to—such findings.

Under the facts hereinabove recited, there is no room for arguing that the procedural requirements explicitly outlined in the pertinent statute are merely directory. In the construction of this statute, its meaning must first be sought in the language employed, and, if that be plain, it is the duty of the courts to apply the statute as written. *United States v. Standard Brewery*, 251 U. S. 210, 64 L. ed. 229. Words and expressions such as "shall" or "in every case" found in the statute under consideration are not only plain and unambiguous; they are imperative and emphatic. Congress is presumed to have used words in a statute in their usual and well-settled sense, *United States*

v. *Stewart*, 311 U. S. 60, 85, L. ed. 40, and the legislation herein considered, not being expressed in technical terms, was addressed to the ordinary man and is, therefore, to be understood in the sense in which it is understood by him. *Addison v. Holly Hill Fruit Products*, 322 U. S. 607.

Another well-known norm of statutory construction relevant in the premises is to the effect that "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U. S. 282, 288, 73 L. ed. 379; *State v. Hanson*, 210 Iowa 773, 23 N. W. 428; *Hurford v. City of Omaha*, 4 Nebraska 336. Of general application, this principle applies with special force to cases involving the construction of statutes dealing with grants of power to corporations generally, e.g., *Head and Armory v. Providence Insurance Company*, 2 Cranch (U. S.) 127, 2 L. ed., 229, and, more especially, to statutes providing for the delegation of power to municipal corporations. Where the charter or statute under which a municipal corporation functions directs in definite terms the manner in which certain corporate acts are to be executed, and points out the departments, offices, or agencies which are to perform them, such specifications must be substantially followed. *Potts v. Village of Haverstraw*, 79 F. 2d 102 (C.C.A. 2, 1935); *City of Fort Scott v. Eads Brokerage Company*, 117 Fed. 51 (C.C.A. 8, 1902); 2 McQuillin, *Municipal Corporations* (3rd ed.) p. 640, et seq.

It is important to observe that the Code provisions discussed herein are not isolated or self-contained legislative mandates. Rather, they are encountered as part of a comprehensive statutory plan providing for the creation, administration, and financing of a Police and Firemen's Relief Fund in the District of Columbia. That plan, minutely developed in seventeen related sections, constitute an integral part of a complete title in our Code of

Laws having the organization and functioning of the Police and Fire Departments for its subject. It is apparent that in prescribing the manner and mode of retiring members of the Police and Fire Departments, Congress was motivated by a desire to secure the public interest and to protect the private benefits conferred upon retirees in an orderly manner, to prevent haste, and to enforce publicity. Statutory procedure designed to effect such purposes are regarded as conditions precedent, and compliance therewith is mandatory. *Collins v. City of Schenectady*, 10 N.Y.S. 2nd 303.

Title 4-514 provides that the Commissioners of the District of Columbia may call "any retired member of the Police Department or Fire Department of the District of Columbia receiving relief under the provisions of Sections 4-501, 4-503, 4-506 to 4-510, 4-512 to 4-514" into active service "for such duty as his disability will permit of him performing" in times of emergency, without compensation therefor. This section furnishes affirmative evidence of congressional policy and intent that the provisions of Title 4-510 are not merely permissive but mandatory. Congress properly contemplated that findings concerning the physical condition and other pertinent data of *all* candidates for retirement will constitute an appropriate record and basis for the exercise of the administrative discretion envisaged in Title 4-514.

In *Helvering v. Hammel*, 311 U. S. 504, 85 L. ed. 303, the Supreme Court stated that while in interpreting a statute courts have some scope for adopting a restricted rather than usual meaning of its words, such meaning is adopted in instances where acceptance of the usual or literal meaning would lead to absurd results or thwart some purpose or policy of the statute, and that courts are not free to reject the literal or usual meaning of words employed in a statute, where no such consequences follow, and where such meaning appears to be consonant with the

purposes of the statute. Title 4-510 should be construed as mandatory not only because of the imperative connotation of its plain terms, but also because such construction comports with the purpose and structure of the legislative scheme of which it is a part.

II

In view of the mandatory character of the provisions of Title 4-510, the conclusion appears inevitable that the non-compliance by the Commissioners of the District of Columbia with those provisions in the case at bar, renders the retirement orders of appellants invalid. *French v. Edwards*, 13 Wall (U. S.) 506; *Lyon v. Alley*, 130 U. S. 177; *Smith v. Stevens*, 10 Wall (77 U. S.) 321; *District of Columbia v. Burgdorf*, 6 U. S. App. D. C. 478.

Such conclusion is especially indicated by the limitations inhering in the official power of the Commissioners of the District of Columbia. Deriving their power from Congress, the mode and manner of executing the granted power to retire members of the Police and Fire Departments, when prescribed, is binding upon the Commissioners of the District of Columbia, as constituting the measure of municipal power. To quote from the opinion in the *City of Fort Scott v. Eads Brokerage Company*, cited *supra*, "The designation by the statutes which grant a corporate power of the way in which it shall be exercised, limits the right to exercise it to the manner thus prescribed, and renders its use in any other way *ultra vires of the corporation and void*." (Italics supplied). See, *Fowler v. Alexandria*, 3 Pet. (U. S.) 398; *City of Astoria v. American La France Fire Engine Company*, 225 F. 21 (C. C. A. 9, 1915); *Mt. States Power Company v. City of Forsyth*, 41 F. Supp. 389; 2 McQuillin, *op. cit. supra*, p. 642.

Appellants have been officially found to have suffered physical disabilities for which they might have been retired (Jt. App. 3, 14). This fact vests them with a right, so long as the applicable statute remains in force, to seek retirement and to obtain relief in accordance with the degree of their disability. *Dougherty v. United States*, 60 U. S. App. D. C. 8, 45 F. 2d 926. It follows that upon a showing of the refusal of the Commissioners of the District of Columbia (Jt. App. 9), to retire appellants in the manner provided by Title 4-510, appellants are entitled to judicial, mandatory relief in the premises.

III

Laches cannot properly be set up against appellants to deprive them of their right to mandatory relief.

While it is true that the appellants were cognizant of the terms of the orders pertaining to their retirements, they were utterly unaware that any practical interest, personal and pecuniary, of theirs was invaded thereby until March 14, 1949. On that date, following a number of contradictory rulings by the Collectors of Internal Revenue in Maryland and Virginia, relative to the question whether the amounts received by appellants herein pursuant to the terms of the orders of retirement pertaining to them, a notice of deficiency of income tax payments for the tax year 1945 was served upon one Joseph B. Simms, one of the retirees actually disabled in the line of duty, but retired for age and length of service. It is, of course, obvious that where the original wrong is not actionable in absence of special damage, the accrual of the right of action and limitation of such right are postponed to the time that damage actually ensues from such wrong, i.e., to the time of impact of the perpetrated wrong upon the complainant in the form of an invasion of his right. *Schmidt v. Merchants Dispatch Transportation Co.*, 270 N. Y. 287, 200 N. E. 824, 2d 680; *McConnel v. Kibbe*, 33

Ill. 175; *Wabash County v. Pearson*, 120 Ind. 426, 22 N. E. 134. Thus in the case of *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963, it was held that until after ejectment has been brought against an alleged cestui que trust, it cannot be said that she slept on her rights for failure to bring suit to have a deed to an alleged trustee reformed so as to disclose the trust. Similarly in *United States v. New Orleans P. R. Co.*, 248, U. S. 507, 63 L. ed. 388, it was decided that one in peaceable possession under an equitable claim does not subject himself to the defense of lack of diligence on his part for delay in asserting his right against the holder of legal title, where nothing has been done to question his claim or disturb his possession.

Furthermore, until such time that the appellants herein were actually faced with some definite economic disadvantage as the result of the illegal action of the Commissioners in failing to adhere to the statutory mandate governing the mode of retirement, appellants did not clearly possess the requisite legal standing to seek redress at a judicial forum. This appears to be the import of the decision in *Brown v. Root*, 18 U. S. App. D. C. 239, ... an action for mandamus against the Secretary of War to compel issuance of an honorable discharge for the alleged reason that the dismissal of the complainant from the service, in disgrace, was not within the power of his commanding general at the time, in which this Court stated:

“But courts do not sit for the vindication of character save to the extent that the same may be involved in or incidental to the enforcement of some remedy for the protection or vindication of rights of person or property.”

Courts will not grant mandamus to vindicate mere abstract rights unattended by any substantial benefit to the applicant for relief. *Payne v. Staunton*, 55 W. Va. 202, 211, 46 S. E. 927, and cases there cited.

From the foregoing, it follows that prior to March 14, 1949, appellants herein did not have such knowledge of any practical invasion of their rights as to make it incumbent upon them to proceed with any action before a court of competent jurisdiction for the purpose of challenging the validity of the orders of retirement which are the subject matter of these proceedings.

The record in this cause fully shows the diligence with which appellants herein have pursued their remedies since March 14, 1949 (Jt. App. 45, 18).

Unlike the statute of limitations, the defense of laches does not depend on mere lapse of time. Lapse of time merely raises the question whether under all the circumstances of the case, a litigant is chargeable with want of due diligence to such an extent as to render it unjust to permit a claim to be enforced. This principle was fully stated by the Supreme Court in the case of *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626:

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the change of conditions which may have arisen during the period in which there has been neglect. In other words, where a court of equity sees that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice or that the intervening rights of third persons may be destroyed, or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect. The adjudicated cases, as said in *Gallagher v. Cadwell* (145 U. S. 368) . . . proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned, and that, because of the change in conditions or relations during this period of delay,

it would be an injustice to the latter to permit him now to assert them."

Prejudice to the defendant or to third parties is as much of an ingredient of the defense of laches as is the lapse of an unreasonable time, and without a showing of such prejudice, laches is not available as a defense. *George v. Ford*, 36 U. S. App. D. C. 315; *U. S. v. Work*, 56 App. D. C. 330, cert. den. 273 U. S. 711; *Hill v. Chambers*, 63 App. D. C. 36; *Lamb v. Patterson*, 81 U. S. App. D. C. 43. See also, *Munter v. Weil Constr. Co.*, 261 U. S. 276; *Southern P.R. Co. v. Bogert*, 250 U. S. 483; *Noble v. Callardo y Seary*, 233 U. S. 65.

Applying these principles to the record made in this case, it cannot be said that appellants' claim is barred by laches as a matter of law. Appellees have made no showing that, as a result of the alleged delay in instituting legal proceedings, any material evidence has been lost, that witnesses became unavailable, or that the granting of the relief prayed for by appellants will result in any financial detriment to appellees, or that they have incurred any expenditures in consequence of the alleged lack of diligence on the part of appellants. Appellants are not seeking to secure any advantages not enjoyed by other retired members of the Police and Fire Departments of the District of Columbia. They are endeavoring to be freed from adverse and discriminatory consequences arising from administrative action taken with reference to them without complying with a positive Congressional mandate. The record (Jt. App. 21) shows that it is the present practice of the Commissioners to comply with the requirements of Title 4-510 in all cases of retirement, whether for age and length of service, or for disability. Under these conditions equality is equity, and the defense of laches cannot be resorted to as an instrument for effecting an injustice. *Hoehn v. Crews*, 144 F. 2d 665;

Cleveland Clinic Foundation v. Humphreys, 97 F. 2d 849, 121 A.L.R. 163.

The defense of laches is inapplicable in the premises for the further reason that appellants herein were misled, however inadvertently, by persons in an official supervisory capacity over them, into believing that they were not entitled to appear before the Board of Surgeons for a physical examination, and that, generally, the procedures prescribed by Title 4-510 of the District of Columbia Code had no application to members of the Police and Fire Departments who have reached the age of 55, and have completed 25 years of service (Jt. App. 18; 22-24).

IV

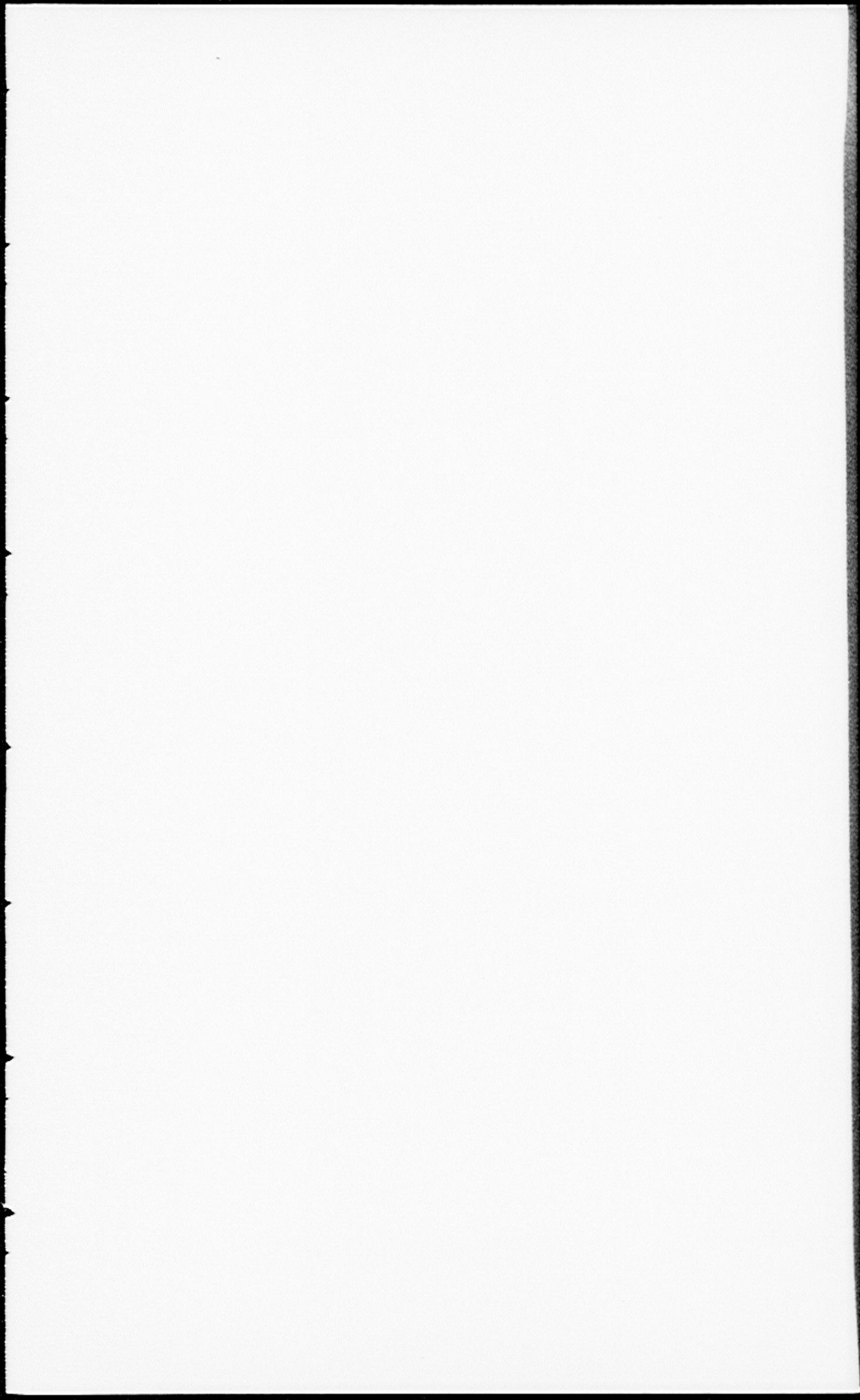
Appellants have moved for summary judgment in the court below on the theory that the facts adduced by appellees, in the form of affidavits, in support of their defense of laches are not legally significant. For the purpose of that motion—and for that purpose only—appellants have admitted the truth of the facts as stated by appellees. Assuming the legal sufficiency of the facts asserted by appellees as a basis for the defense of laches, that consideration would render legally proper the denial of appellants' motion for summary judgment, but would not support the ruling of the court below granting appellees' motion for summary judgment. The facts asserted by appellants in connection with the issue of laches are in contradiction of those adduced by appellees on the same issue (Jt. App. 25 *et seq.*). No citation of authorities is required to show that the existence of a genuine issue upon such material facts should preclude the entry of judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

CONCLUSION

For the reasons hereinabove stated, it is respectfully prayed by appellants that the judgment of the court below granting the motion of summary judgment in favor of appellees should be reversed.

Respectfully submitted,

/s/ IRVING WILNER
/s/ KEITH L. SEEGMILLER
/s/ RAY R. MURDOCK



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United States Court of Appeals

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Commissioners of the District of Columbia,
Appellees.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

1 Filed Dec 19 1952 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH W. ALLEN
636 South Carolina Ave., S. E.
Washington, D. C.
et al.

Plaintiff

v.

F. JOSEPH DONOHUE
RENAH F. CAMALIER
BERNARD L. ROBINSON

Commissioners of the District of Columbia
Defendants

Civil Action No. 5714-'52

Complaint for Illegal Retirement

1. The jurisdiction of this Court is provided by Section 1331, Title 28, U. S. Code; Title 11-315, D. C. Code, 1940.

2. This suit is brought by Joseph W. Allen, the above-named plaintiff and by all those whose names appear on Exhibit 1, attached hereto, also plaintiffs herein, on behalf of themselves and others, if any, similarly situated. The plaintiffs are citizens of the United States, and each now resides at the address indicated by his name. The character of the right sought to be enforced for the plaintiffs, as a class, is several and there are common questions of law affecting said rights, and the nature of the relief sought is common to all. The defendants are the Commissioners of the District of Columbia and are sued in their official capacities.

3. Each of the plaintiffs was formerly a member of either the Fire Department or the Police Department of the District of Columbia and with regard to each plaintiff the Commissioners of the District of Columbia have heretofore entered an order retiring him for age and length of service.

4. With respect to each plaintiff, at the time of his retirement the following things were not done: (a) He was not sent before the Board of Police and Fire Surgeons for medical examination or for any consideration by said Board of his then physical condition; (b) The said Board of Police and Fire Surgeons did not certify his physical condition in writing to the Retiring and Relief Board; (c) He was not given written notice by said Retiring and Relief Board to appear before it and give such evidence under oath as he may desire, and he did not in fact appear before said Board nor give any evidence to it; (d) The Retiring and Relief Board did not submit to the Commissioners of the District of Columbia a report of its findings as to his physical conditions, nor did it make any such findings; (e) The Commissioners of the District of Columbia did not approve, disapprove or modify any report from the Retiring or Relief Board concerning his physical condition. These omissions constitute a violation of Title 4-510, D. C. Code, 1940.

5. With respect to each of the plaintiffs, all of the five things enumerated in Paragraph 4, above, as not having been done at the time of his retirement, were done subsequent to his retirement and with respect to each of the plaintiffs the Retiring and Relief Board has now found that at the time of his retirement he was suffering from disability incurred in line of duty, for which he might have been retired for disability had he not been retired for age and length of service, and the Commissioners of the District of Columbia have approved such finding.

6. Each of the plaintiffs, either directly or through some other person on his behalf, has petitioned the Commissioners of the District of Columbia for relief as shown by the following prayer for relief contained in a petition filed with said Commissioners on October 9, 1952: "Each of them (plaintiffs here) asks the Commissioners (a) to reconsider his case in the light of the fact, not considered at the time of his retirement, that he was then disabled; (b) to follow the procedure prescribed by Section 510 of Title 4 of the District of Columbia Code for the purpose of such reconsideration; (c) to determine whether his retirement should have been for disability; and (d) in the event it is found that retirement for disability is proper to determine the degree of his disability and to make an award of benefits retroactively effective to the date of actual retirement, said findings and award to be incorporated in an order to be entered in lieu of the order heretofore entered retiring him from the service."

7. However, the said Commissioners have denied such relief solely upon the ground that they lack legal authority to modify the retirement orders heretofore entered retiring the plaintiffs from service. This is shown by a letter from the Secretary to the Board of Commissioners, a copy of which is attached hereto and made part hereof as Exhibit 2.

3 8. The plaintiffs, and each of them, are denied certain valuable pecuniary rights, as the direct result of the unlawful manner of their retirements. Among such rights is the right to have such retirement benefits excluded from their gross income for the purposes of determining their income tax liability to the United States. From a time beginning subsequent to the retirements of the plaintiffs herein the procedural steps prescribed by Section 510, Title 4 of the District of Columbia Code (being the same as those mentioned in Paragraph 4 of this Complaint) with respect to the retirement of other

members of the Police and Fire Departments under identical circumstances have been followed, resulting in a continuing discrimination adverse to the interests of these plaintiffs, contrary to law.

WHEREFORE, these premises considered, the plaintiffs pray:

1. That the process of this Court may issue requiring the defendants to appear and answer the exigencies of this Complaint;

2. That an order be entered declaring that each of the orders retiring the plaintiffs from the Police or Fire Departments of the District of Columbia was illegal and invalid for failure to comply with procedural requirements of Section 510—Title 4 of the District of Columbia Code;

3. That an order be entered herein directing the defendants to reconsider the retirement rights of each of the plaintiffs upon a record developed in the manner prescribed by Section 510, Title 4 of the District of Columbia Code and that such retiring order be entered for each plaintiff as is found to be proper upon such reconsideration;

4. And for such other and further relief as to the Court may seem just and proper.

/s/ Keith L. Seegmiller
Keith L. Seegmiller

/s/ Irving Wilner
Irving Wilner

/s/ Ray R. Murdock
Ray R. Murdock
Attorneys for Plaintiffs
1616 Eye St. N. W.

4 Filed Dec 19 1952 Harry M. Hull, Clerk

Exhibit 1

Mr. Charles E. Addison
800 P Street, N. E.
Washington, D. C.

Mr. William A. Bryarly
White Post
Virginia

Mr. Walter C. Allen
2516 Crest Avenue
Cheverly, Md.

Mr. Charles L. Byram
910 Constitution Ave., N. E.
Washington, D. C.

Mr. Willie L. Atkins
4712 Wisconsin Ave., N. W.
Washington, D. C.

Mr. Charles J. Capps
625 Delafield Place, N. W.
Washington, D. C.

Mr. Thomas D. Bailey
825 E Street, S. E.
Washington, D. C.

Mr. H. A. Chapman
446 Francis Blvd.
Lakeland, Fla.

Mr. A. J. Bargagni
4813 Wellington Drive
Bethesda, Md.

Mr. H. J. Clark
2835 - 27th St., N. E.
Washington, D. C.

Mr. Edward Bass
213 N. Cleveland St.
Arlington, Va.

Mr. P. C. Coffman
526 Peabody St., N. W.
Washington, D. C.

Mr. Otto A. Becker
2410 Arcola Ave.
Silver Spring, Md.

Mr. James F. Costello
4215 - 12th place, N. E.
Washington, D. C.

Mr. James F. Beckett
729 Kennedy St., N. W.
Washington, D. C.

Mr. Ralph M. Cox
1342 S. Columbus St.
Arlington, Va.

Mr. P. S. Boarman
4330 - 3rd St., N. W.
Washington, D. C.

Mr. Valentine M. Crawford
3804 - 37th Ave.
Cottage City, Md.

Mr. George R. Browning
8720 Manchester Rd.
Silver Spring, Md.

Mr. Lamon C. Davis
106 - 7th St., N. E.
Washington, D. C.

7 A

Mr. Thomas W. Dixon 4515 Kansas Ave., N. W. Washington, D. C.	Mr. Wilbert C. Lewis 421 Buchanan St., N. W. Washington, D. C.
Mr. Allen W. Guyer 4824 Piney Branch Rd., N. W. Washington, D. C.	Mr. W. R. Lusby Box 277 North Beach, Md.
Mr. Charles G. Harper 512 - 13th St., S. E. Washington, D. C.	Mr. John F. Madigan 3115 - 9th Road Arlington, Va.
Mr. Hamilton H. Harrison 610 Emerson St., N. W. Washington, D. C.	Mr. William L. McMahon 5701 - 37th Ave. Hyattsville, Md.
Mr. John W. C. Heflin Route 1 - Box 25 Proffit, Va.	Mr. R. E. Midgett 52 W Street, N. W. Washington, D. C.
Mr. Richard J. Holmes Route 3 - Box 160 Rockville, Md.	Mr. Owen R. Moxley 8404 Cedar St. Silver Spring, Md.
Mr. Edward L. Hunt 1404 S Street, S. E. Washington, D. C.	Mr. Philip W. Nicholson 5504 - 13th St., N. W. Washington 11, D. C.
Mr. John S. Jones Route #1 Leonardtown, Md.	Mr. Edward H. Nohe 1007 N. Capitol St. Washington 2, D. C.
Mr. Isaac H. Johnson 2001 Ft. Davis St., S.E. #201 Washington, D. C.	Mr. Thomas O'Brien 5128 - 5th St., N. W. Washington, D. C.
Mr. Frank L. Kemper 1415 - 51st Ave. Hillside 19, D. C.	Mr. Edward O'Connor 3600 Connecticut Ave., N. W. Washington, D. C.
Mr. James C. Lacey Spring Hill Maryland	Mr. Thomas F. Quinlan 10123 Pierce Drive Silver Spring, Md.

8 A

Mr. D. J. Reilly
4120 Garrison St., N. W.
Washington, D. C.

Mr. E. J. Ruffner
2000 Evarts St., N. E.
Washington, D. C.

Mr. Samuel W. Ruffner
1634 Lang Place, N. E.
Washington, D. C.

Mr. E. W. Seaman
3818 Calvert St., N. W.
Washington, D. C.

Mr. John Sheahan
1230 Independence Ave., S. E.
Washington, D. C.

Mr. Grover C. Shumaker
3938 Madison St.
Hyattsville, Md.

Mr. Hervey A. Smith
Kinsale
Westmoreland County, Va.

Mr. Irvin G. Steed
1114 Branch Ave., S. E.
Washington, D. C.

Mr. John W. Stevenson
1423 D St., N. E.
Washington, D. C.

Mr. C. F. Sullivan
737 Crittenden St., N. E.
Washington, D. C.

Mr. Jeremiah A. Sullivan
7201 Georgia Ave., N. W.
Washington, D. C.

Mr. H. G. Watson
Box 242
Glendale, Md.

Mr. John B. Watt
5415 Connecticut Ave., N. W.
Washington, D. C.

Mr. B. W. Weaver
1919 T St., S. E.
Washington 20, D. C.

Mr. H. C. Wetherall
4640 Chesapeake St., N. W.
Washington, D. C.

Mr. Thomas J. Williams
Box 213
Colonial Beach, Va.

Mr. James E. Wilson
504 Oglethorpe St., N. W.
Washington, D. C.

Mr. Ralph E. Wilson
2611 N. 18th St.
Arlington, Va.

9 A

6 Filed Dec 19 1952 Harry M. Hull, Clerk

Exhibit 2

Government of the District of Columbia
Executive Offices

Washington 4, D. C.

Nov. 18, 1952

Irving Wilner, Esq.,
1616 Eye Street, Northwest,
Washington 6, D. C.

Dear Mr. Wilner:

This is to acknowledge receipt of your letter dated November 12, 1952, with reference to the petition which was presented on behalf of a number of retired policemen and firemen seeking modification in the terms of the orders of retirement in the appropriate cases, and the oral presentation made before the Board of Commissioners on October 9, 1952.

Please be advised that the Commissioners have given careful consideration to this matter. The Office of the Corporation Counsel has ruled that the Commissioners are without authority to modify these retirement orders since they were in accordance with law and are valid. Accordingly, the request was denied.

Very truly yours,

/s/ G. M. Thornett
G. M. Thornett,
Secretary to the Board of
Commissioners, D. C.

• • • •

7 Filed Feb 2 1953 Harry M. Hull, Clerk

Notice

To: Keith L. Seegmiller, Esq.,
1616 Eye Street, N. W.,
Washington, D. C.

Please take notice that the attached Motion for Summary Judgment with Points and Authorities in Support thereof, will be filed on the 2nd day of February, 1953.

The rules of this Court require that if you oppose the granting of said Motion you shall within five days from the date of the service of said Motion upon you, or such further time as the said Court may grant, or as the parties may agree upon, file in reply with the Clerk of said Court, a statement of the points and authorities upon which you rely, and serve a copy thereof upon the undersigned attorneys for the defendants.

/s/ Vernon E. West
Vernon E. West
Corporation Counsel, D. C.

/s/ OLIVER GASCH
OLIVER GASCH
Assistant Corporation Counsel,
D. C.

/s/ Milton D. Korman
Milton D. Korman
Assistant Corporation Counsel,
D. C.
Attorneys for Defendants
District Building
Washington, D. C.

• • • •

8 Filed Feb 2 1953 Harry M. Hull, Clerk

Motion for Summary Judgment

The defendants move the court, upon consideration of the complaint and the four exhibits hereto annexed and made a part hereof by reference, to enter summary judgment in favor of the defendants.

/s/ Vernon E. West
Vernon E. West
Corporation Counsel, D. C.

/s/ Oliver Gasch
Oliver Gasch
Assistant Corporation Counsel,
D. C.

/s/ Milton D. Korman
Milton D. Korman
Assistant Corporation Counsel,
D. C.
Attorneys for Defendants
District Building,
Washington, D. C.

* * * *

9 Filed Feb 2 1953 Harry M. Hull, Clerk

Exhibit 1

Affidavit in Support of Motion for Summary Judgment

DISTRICT OF COLUMBIA, ss:

Personally appeared Lowell A. Goad, who being first duly sworn, upon his oath deposes and says:

I am a Private in the Metropolitan Police Department of the District of Columbia and assigned as officer in charge of records and files of the Metropolitan Police

Department. I examined the list of names of plaintiffs set forth in the complaint in the above-entitled cause and found that of 61 names of former policemen and firemen named as plaintiffs in said cause but 16 were members of the Metropolitan Police Department. I have examined the pension files and payroll records of these 16 individuals and find the following to be matters of record therein:

One of the 16 individuals, Charles E. Addison, retired in 1933 for disability incurred in line of duty and was ordered at that time to receive the maximum pension allowance to retired members of the Metropolitan Police Department, namely, 50% of the amount of his salary as an active member of the department. Since that time he has received regularly that allowance plus any increases provided for by law.

All of the remaining 15 former policemen were retired on the basis of their age and length of service, some at their own request after passing the minimum age and length of service for retirement and others upon reaching the maximum age limit when retirement is required. Of these 15, four retired between 1932 and 1940, and eleven retired between 1940 and 1947. All of these former members were ordered to receive on retirement the maximum pension allowance provided for by law, namely,
10 50% of the amount of their pay as active members of the Metropolitan Police Department, and all have since been receiving regularly at least such maximum pension plus any increases therein provided for by law.

/s/ Lowell A. Goad

Subscribed and sworn to before me this 28th day of January, 1953.

/s/ Adam A. Giebel
Notary Public, D. C.

* * * *

11 Filed Feb 2 1953 Harry M. Hull, Clerk

Exhibit 2

Affidavit in Support of Motion for Summary Judgment

DISTRICT OF COLUMBIA, ss:

Personally appeared Melvin R. Oliveri, who being first duly sworn, upon his oath deposes and says:

I am a civilian employee of the Fire Department of the District of Columbia, assigned as Fire Department Secretary to the Police and Firemen's Retiring and Relief Board and have access to and am familiar with the pension and payroll files of the Fire Department of the District of Columbia. I examined the list of plaintiffs named in the complaint in the above-entitled cause and found that 45 of the 61 plaintiffs are former members of the Fire Department. I have examined the Fire Department pension files and payroll records of these 45 individuals and find the following to be matters of record therein:

Two of the 45 individuals were retired from the Fire Department prior to 1940—one, Philip W. Nicholson, on July 31, 1931, and another, A. J. Bargagni on July 31, 1939. The remaining 43 were retired in various years between 1941 and 1947, as follows: 8 in 1941; 8 in 1942; 6 in 1943; 2 in 1944; 8 in 1945; 10 in 1946; and 1 in 1947. All of these former members of the Fire Department were retired on the basis of their age and length of service in the department, some at their own request after passing the minimum age and length of service required by law for retirement, and others upon reaching the maximum age limit when retirement is mandatory. All of these retired members were, by commissioners order, re-

12 tired at the maximum pension allowance provided for by law, i.e., one-half the amount of their pay as active members of the Fire Department, and since their retirements all have been receiving regularly at least such maximum pension plus any increases therein that have since been provided for by law. Since said retirement orders were entered none performed any active duty for the Fire Department.

The file of each plaintiff shows that sometime subsequent to the year 1947 an order was issued by the Commissioners of the District naming him, or him and others, and stating, essentially, that, at the time of retirement, he was suffering from physical disabilities which were incurred in the line of duty to such an extent that had he not been retired when he was, for age (or at his own request for age and length of service), he would have been retired for physical disability incurred in the line of active duty.

/s/ Melvin R. Oliveri

Subscribed and sworn to before me this 2nd day of February, 1953.

/s/ Adam A. Giebel
Notary Public, D. C.

* * * *

13 Filed Feb 2 1953 Harry M. Hull, Clerk

Exhibit 3

Affidavit in Support of Motion for Summary Judgment

DISTRICT OF COLUMBIA, ss:

Personally appeared Joseph W. Conroy, who being first duly sworn, upon his oath deposes and says:

I am a Battalion Chief of the Fire Department of the District of Columbia and presently assigned as Executive

Officer of the Fire Department. I have been a member of the Fire Department for 28 years and I am familiar with the laws, regulations, practices and procedures regarding retirement of policemen and firemen in the District service.

There are three situations under which members of the Police and Fire Departments may be retired:

1. When incapacitated for duty by reason of injury in line of duty.
2. By request of a member who has served 25 years or more and has reached the age of 55.
3. In the discretion of the Commissioners after a member has reached the age of 60 years.

With regard to the third category, a Commissioner's Order makes retirement at age 64 mandatory except under exceptional circumstances. By law those in the second category receive the maximum retirement benefit of 50% of their active pay. In practice those retiring under the third category also always receive the full retirement benefit of 50% of their active pay. Only in the case of those retiring under the first category does the retiring member sometimes receive less than the maximum retirement pay. I know of a number of instances in which the retirement allowance to a retiring member based on
14 disability is less than 50% of the retiring members full salary.

Because of this situation and the further fact that retirement based on physical disability was at one time thought to carry some stigma and to reduce the chances for future employment in other lines of endeavor, retiring members almost universally sought retirement on the basis on age and length of service—at least this was true until sometime in 1947.

In June of 1947 Judge David A. Pine of the United States District Court for the District of Columbia held in the case of *Frye v. United States* that retirement benefits paid to retired members of the Police and Fire Departments of the District of Columbia after they have been retired for disability incurred in line of duty were not subject to federal income tax. After that decision practically all members of the Police and Fire Departments were, naturally, anxious to avoid the tax and those who had ever suffered any physical disability were desirous of appearing before the Board of Police and Fire Surgeons and the Retiring and Relief Board before retiring from the Department so that, if possible, their retirement benefits might be classified as disability allowances rather than pension allowances based on age and length of service.

/s/ Joseph W. Conway

Subscribed and sworn to before me this 28th day of January, 1953.

/s/ Adam A. Giebel
Notary Public, D. C.

• • • •

15 Filed Feb 2 1953 Harry M. Hull, Clerk

Exhibit 4

"C.O. 300,890/1

408451

Government of the District of Columbia
Executive Offices
Washington

December 10, 1941

ORDERED:

That on and after January 1, 1942, officers and members of the Metropolitan Police Department of the Dis-

trict of Columbia, who have reached the age of sixty-four years, shall be retired and granted the maximum relief allowed by law. In each such case the Major and Superintendent of Police shall, thirty days prior to the effective date of any retirement made in accordance with this order, report the essential facts in each case to the Commissioners, in order that appropriate proceedings may be initiated.

By order of the Board of Commissioners, D. C.

/s/ G. M. Thornett
Secretary of the Board."

• • • •

16 Filed Feb 2 1953 Harry M. Hull, Clerk

Exhibit 5

"C.O. 300,890/2

408955

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICES
WASHINGTON

January 5, 1942.

ORDERED:

That on and after March 1, 1942, officers and members of the Fire Department of the District of Columbia who have reached the age of sixty-four years, shall be retired and granted the maximum relief allowed by law. In each such case the Chief Engineer of the Fire Department shall, thirty days prior to the effective date of any retirement made in accordance with this Order, report the essential facts in each case to the Commissioners, in order that appropriate proceedings may be initiated.

By order of the Board of Commissioners, D. C.

/s/ G. M. Thornett
Secretary to the Board."

* * * *

17 Filed Feb 27 1953 Harry M. Hull, Clerk

*Memorandum in Opposition to Defendants' Motion for
Summary Judgment and Motion of Plaintiffs
for Summary Judgment*

Plaintiffs in the above-entitled cause, by and through their attorneys, do hereby oppose the motion of the defendants for summary judgment, and respectfully move this honorable Court for a summary judgment in their favor for the reason that the pleadings, admissions, and affidavits on file in this cause conclusively show that there is no genuine issue as to any material fact to be resolved by trial, and that the law governing the rights of the parties herein requires that this Court enter a judgment granting to the plaintiffs the relief prayed for in the Complaint filed on their behalf.

/s/ Keith L. Seegmiller
Keith L. Seegmiller

/s/ Ray R. Murdock
Ray R. Murdock

/s/ Irving Wilner
Irving Wilner

* * * *

19 Filed Feb 27 1953 Harry M. Hull, Clerk

Affidavit of Webster R. Frye

Webster R. Frye, first being duly sworn, upon oath deposes and says that he is the President of the Retired Firemen's Association, District of Columbia, a fraternal organization composed of retired officers and men of the Fire Department, District of Columbia: that the said Association has for its purpose the furtherance and improvement of the civic, legal, and financial welfare of its

members; that he has been a member of the said Association since 1932; that he served the Association as Vice President from 1938 to 1947, as President from 1947 to 1949, as Vice President in 1950, and President from 1951 to date; and that he is thoroughly conversant with the official actions of the Association.

Affiant further states upon his own knowledge that some time in July 1945 W. L. McMahon and Armand Chapman, plaintiffs in the above-entitled cause, specifically requested of the then Chief Engineer, D. C. Fire Department, that they be retired for disability incurred in the line of duty, and that they be given an opportunity to appear before the Board of Surgeons in connection therewith, and that such procedure was not followed, and the said complainants retired for age and length of service due, solely, to the representations made to them by the said Chief Engineer that it was not necessary for them to appear for such an examination, they having completed 25 years of service and having reached the age of 55 years; that the above representation of the then Chief Engineer, D. C. Fire Department, was given wide publicity at meetings of the Association and otherwise, and that consequently members of the D. C. Fire Department formed the opinion and belief that candidates for retirement who have served

for 25 years and have reached the age of 55 years
20 were not, by law, entitled to appear before the
Board of Surgeons and before the Retiring and Relief Board.

Affiant further avers that since approximately 1944 the Association did, directly or through counsel, take many actions intended to minimize or overcome the effects of retiring orders based upon age and length of service, upon its members who were, in fact, incapacitated from performing their duties in the Fire Department on account of disabilities incurred in the line of duty. Such action

included personal appearances before the Bureau of Internal Revenue, the Commissioners of the District of Columbia, and communications with them. It was not until March 14, 1949, the date when the Commissioner of Internal Revenue served a notice of deficiency upon Joseph B. Simms, for the tax year 1945 that the members of the Association concluded that they must look to the courts for the relief from the inequitable tax burden to which they had been made subject through the retirement orders not rendered in compliance with law. The Association engaged counsel for the purpose of presenting the petition of Joseph B. Simms, as a test case in the United States Tax Court in 1949. When the Tax Court entered a decision adverse to petitioner in the Simms case, the Association, on behalf of all the complainants, engaged counsel for the purpose of filing an appeal from that decision. Both prior and subsequent to the decision on appeal in the Simms case, the Association did, on numerous occasions, through its officers and counsel, make representations before the Commissioners of the District of Columbia for the purpose of obtaining retroactive modifications of the orders of retirement which are the subject matter of these proceedings, which were instituted following a final, adverse decision by the Commissioners on November 18, 1952.

Affiant further states that since approximately 1948, following the decision of the United States District Court of the District of Columbia in the case of *Webster R. Frye v. United States*, 72 F. Supp. 405, it has become the uniform practice both in the Fire and Police Departments of the District of Columbia to refer all candidates for retirement, regardless of age or length of service, to the Board of Surgeons for a report concerning their physical condition.

/s/ Webster R. Frye
Webster R. Frye

Subscribed and sworn to before me this 27th day of February, 1953.

/s/ Susanne McB. Farnsworth
Notary Public

My Commission Expires March 14, 1953

* * * *

22 Filed Feb 27 1953 Harry M. Hull, Clerk

Affidavit of Keith L. Seegmiller

I, Keith L. Seegmiller, being first duly sworn, depose and say that I am one of the attorneys for the plaintiffs in the above-entitled case; that as such attorney I have made investigation concerning matters pertaining to this case, and that in the course of such investigation I have been informed and believe and I therefore allege that the following is a true and correct copy of an order entered by the Commissioners of the District of Columbia on January 16, 1948:

"ORDERED:

That after the approval of this order, all members of the Metropolitan Police Department of the District of Columbia, the United States Park Police Force, the White House Police Force, and the Fire Department of the District of Columbia, who are applicants for retirement under the provisions of Section 4-508 of the 1940 D.C. Code (The Act of September 1, 1916, 39 Stat. 721 ch. 433, sec. 12, paragraph added by Act of October 14, 1940, 54 Stat. 1118 ch. 860), shall in each and every case appear before the Police and Firemen's Retiring and Relief Board for consideration of all matters pertinent to their retirement.

By Order of the Board of Commissioners, D. C.

/s/ G. M. Thornett
Secretary to the Board."

/s/ Keith L. Seegmiller
Keith L. Seegmiller

Subscribed and sworn to before me this 27th day of
February, 1953.

/s/ Suzanne McB. Farnsworth
Notary Public

My Commission Expires March 14, 1953.

* * * *

23 Filed Mar 16 1953 Harry M. Hull, Clerk

Affidavit of Thomas F. Quinlan

County of Montgomery)
State of Maryland) ss.

I, Thomas F. Quinlan, being first duly sworn, depose
and say that on June 25, 1942 and for many years prior
thereto I was a member of the Metropolitan Police Force
of the District of Columbia, assigned to duty at the
White House.

On or about June 25, 1942 I requested a short period
of leave for vacation, which was denied me on that date
on the grounds that my services could not be spared.
Later the same day I was advised of a decision that I
was to be retired effective at the expiration of my accrued
annual leave, but that my active duty would end as of
the night of June 25, 1942.

Pursuant to advice that I was required to retire, certain
papers were presented to me by my superior officer pur-
porting to be papers necessary for an application for

retirement. These papers contained a statement that it would be unnecessary for me to appear before the Board of Police and Fire Surgeons and I was advised orally that examination by the Board was neither necessary nor permissible in connection with my retirement.

I was retired thereafter effective August 1, 1942, without any appearance before the Board of Police and Fire Surgeons or the Retiring and Relief Board, or any other board or agency in connection with my retirement.

/s/ Thomas F. Quinlan
Thomas F. Quinlan

Subscribed and sworn to before me this 13th day of March, 1953.

/s/ Blanche W. Renairi
Notary Public

My Commission Expires 4 May 1953

* * * *

24 Filed Mar 16 1953 Harry M. Hull, Clerk

Affidavit of Jeremiah McCarthy

I, Jeremiah McCarthy, being first duly sworn, depose and say that during the month of June 1938 I applied to the Commissioners of the District of Columbia for retirement from service as a private in the Metropolitan Police Force, stating that I had reached the retirement age and that I had the required length of service for retirement.

A few days after submitting this application for retirement I was advised to appear for examination before the Board of Police and Fire Surgeons and in accordance with that advice I did report to the clinic within a few days, and during the month of June 1938. I waited at the clinic for approximately 3/4 of an hour expecting to

be called for examination. At the end of that time, however, one of the staff members came out of the office of the doctor and advised me to wait no longer because I would not need to submit to examination. In accordance with that advice I returned to duty and was, in fact, retired for age and length of service effective June 30, 1938, and I was never thereafter requested to appear before the Board of Police and Fire Surgeons, or given any information to the effect that I had a right to appear before that Board.

/s/ Jeremiah McCarthy
Jeremiah McCarthy

Subscribed and sworn to before me this 5th day of March, 1953.

/s/ Suzanne McB. Farnsworth
Notary Public

My Commission Expires March 14, 1953.

• • • •

25 Filed Apr 1 1953 Harry M. Hull, Clerk

*Supplemental Exhibits in Support of the Defendants'
Motion for Summary Judgment*

• • • •

26 Filed Apr 1 1953 Harry M. Hull, Clerk

*Affidavit of Stephen T. Porter in Support of Motion for
Summary Judgment in Behalf of Defendants*

DISTRICT OF COLUMBIA, ss:

Personally appeared Stephen T. Porter who, being duly sworn, upon his oath deposes and says:

I am a retired Chief Engineer of the Fire Department of the District of Columbia. I served as a member of

the Fire Department from October 15, 1911 until my retirement on March 1, 1946. I was Chief of the Department from March 3, 1939 until I retired.

During the time that I was a member of the Fire Department most of the members who retired and who had the requisite age or age and length of service sought retirement on the basis of age or age and length of service rather than on the basis of disability incurred in line of duty, for the reason that those retired on the basis of age alone, or age and longevity were assured retirement pay equal to 50% of their pay as active members of the department, while those retired on disability might, because of the nature of the disability, receive less than 50% of their active pay. Moreover, many retired men supplement their retired pay with outside work and retirement based on physical disability was thought by some to carry with it some stigma and reduce the chances for future employment in other lines of work.

I have had read to me the affidavit of Webster R. Frye filed in the above-entitled cause. Neither Battalion Chief Chapman, who retired in 1941, nor Battalion Chief McMahon, who retired in 1945, specifically requested of me that they be retired for disability incurred in
27 line of duty. In the case of each of these men I merely transmitted the written requests for retirement made by them. If, while I was Chief Engineer of the Fire Department, I was asked whether appearance before the Board of Surgeons was necessary in connection with retirement based on age or on age and longevity, it is quite possible that I replied in the negative for the reason that, if a member of the department had the requisite age or age and length of service and requested retirement, his physical condition had no bearing whatsoever on whether he should be retired and no bearing whatso-

ever on the amount of retired pay he should thereafter receive.

/s/ Stephen T. Porter

Subscribed and sworn to before me this 31st day of March, 1953.

/s/ Adam A. Giebel
Notary Public, D. C.

* * * *

28 Filed Apr 1 1953 Harry M. Hull, Clerk

*Supplemental Affidavit of Lowell A. Goad in Support of
Motion for Summary Judgment in Behalf of
Defendants.*

DISTRICT OF COLUMBIA, ss:

Personally appeared Lowell A. Goad who, being first duly sworn, upon his oath deposes and says:

I am a Private in the Metropolitan Police Department of the District of Columbia and assigned as Officer-in-Charge of Records and Files of the Metropolitan Police Department. I have examined the files in my custody concerning Thomas F. Quinlan, formerly a Sergeant of the White House Police Force, and Jeremiah McCarthy, formerly a Private in the Metropolitan Police Force, the former having retired effective as of August 1, 1942, and the latter having retired effective as of July 1, 1938.

Attached hereto and made a part hereof by reference and hereby certified to by me as true copies of the originals which are part of the Police Department files of the said Quinlan and the said McCarthy, are the following papers:

1. Letter dated July 25, 1942 from Quinlan to Captain Marcey of the White House Police requesting retirement.

2. Letter dated July 25, 1942 from Captain Marcey to Chief Frank J. Wilson, United States Secret Service, recommending Quinlan's retirement.

3. Letter dated July 27, 1942 from Chief Wilson to Major Kelly, Superintendent of Metropolitan Police, transmitting No. 1 and No. 2 above and recommending Quinlan's retirement.

4. Letter dated July 29, 1942 from Acting Superintendent of Police Callahan to the Commissioners of the District recommending retirement of Quinlan.

29 5. Official order of the Commissioners dated July 29, 1942 directing Quinlan's retirement.

* * * *

A. Letter dated May 29, 1938 to Captain Miller, commanding 3rd Precinct, from Private McCarthy requesting retirement.

B. Letter dated May 28, 1938 to the major and Superintendent of Police from Captain Miller transmitting McCarthy's request for retirement and recommending same.

C. Memorandum dated May 28, 1938 from Assistant Superintendent Edwards to Captain of Third Precinct directing McCarthy to report to Board of Surgeons.

D. Memorandum dated May 28, 1938 from Assistant Superintendent Edwards to Board of Surgeons requesting report on physical condition of McCarthy.

E. Medical survey report on Private McCarthy by the Board of Police and Fire Surgeons.

F. Order of the Board of Commissioners dated June 3, 1938 directing retirement of Private McCarthy.

/s/ Lowell A. Goad

Subscribed and sworn to before me this 1st day of April, 1953.

/s/ Emmett P. Bateman
Emmett P. Bateman
Notary Public, D. C.

My Commission Expires December 15, 1953

30 Filed Apr 1 1953 Harry M. Hull, Clerk

COPY

White House District
White House Police
Captain Herbert L. Marcey,
Commanding,
White House Police.

July 25, 1942

Sir:

I hereby request that I be allowed to retire from active duty with the White House Police, to become effective on and after August 1, 1942, or in other words, at the close of business July 31, 1942.

I will, at that time, lack five days of completing thirty-six years continuous police duty, with the Metropolitan and White House departments, having been appointed on August 5, 1906. And, I have passed the age necessary for voluntary retirement. Under these conditions it will not be necessary to appear before the Police and Firemen's Retiring Board.

I appreciate your cooperation in this request.

Respectfully submitted,

Thomas F. Quinlan,
Sergeant,
White House Police.

TFQ/wh

31 Filed Apr 1 1950 Harry M. Hull, Clerk

COPY

Captain Marcey
Chief Frank J. Wilson

July 25, 1942

Retirement of Sergeant T. F. Quinlan

Attached you will find letter submitted by Sergeant T. F. Quinlan of my command, requesting that he be retired from the White House Police force, effective close of business July 31, 1942.

I respectfully recommend that Sergeant Quinlan be retired from this force effective close of business July 31, 1942 so that he will be able to accept a position at the New Naval Hospital beginning on August 1, 1942.

Herbert L. Marcey
Captain

HLM/w

APPROVED:

/s/ M. F. Reilly
Supervising Agent

32 Filed Apr 1 1953 Harry M. Hull, Clerk

COPY

TREASURY DEPARTMENT

Washington, D. C.

July 27, 1942

Office of the Chief
U. S. Secret Service
Major Edward J. Kelly,
Superintendent of Police,
Metropolitan Police Department,
Washington, D. C.

Dear Major Kelly:

The attached copies of correspondence indicate the application of Sergeant T. F. Quinlan for retirement from the White House Police Force, effective at the close of business July 31, 1942, on account of age and length of service. Sergeant Quinlan expresses his intention to accept a position at the new Naval Hospital, beginning August 1.

Sergeant Quinlan will accordingly be relieved from duty at the White House on the given date and we recommend that he receive the consideration of the Retirement Board as requested.

Yours very truly,

/s/ Frank J. Wilson
Chief, U. S. Secret Service

23 Filed Apr 1 1953 Harry M. Hull, Clerk

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Metropolitan Police Department

July 29, 1942

TO: The Commissioners, D. C.

IN RE: Retirement of Sergeant Thomas F. Quinlan,
White House Police Force.

REPORT: Sergeant Thomas F. Quinlan was appointed a member of the Metropolitan Police Force August 5, 1906; was transferred to the White House Police Force, September 30, 1922, was born October 28, 1879; has served continuously for over thirty-five years and has reached the age of sixty-two years. As he has filed his application for retirement the following order is recommended.

RECOMMENDATION: Issuance of the following order:

“ORDERED:

“1. That Sergeant Thomas F. Quinlan, of the White House Police Force, having reached the age of sixty-two years and having served continuously for over thirty-five years is hereby retired, at his own request, to take effect from and after July 31, 1942, under the authority granted the Commissioners by an Act of Congress approved October 14, 1940, making an amendment to the retirement law for the Police and Fire Departments, District of Columbia.

“2. That Sergeant Thomas F. Quinlan of the White House Police Force, is hereby granted relief in the sum of \$114.58 per month payable from the Police and Fire-

32 A

men's Relief Fund, D. C., to take effect on and after August 1, 1942."

Harvey G. Callahan,
Acting Major and Superintendent.

C/tw
Copy to:
Pvt. Stickley

COPY

34 Filed Apr 1 1953 Harry M. Hull, Clerk

P. D. 18.2908

415080

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office
Washington

COPY

July 29, 1942.

ORDERED:

That Sergeant Thomas F. Quinlan of the White House Police Force, having reached the age of sixty-two years and having served continuously for over thirty-five years is hereby retired, at his own request, to take effect from and after July 31, 1942, under the authority granted the Commissioners by an Act of Congress approved October 14, 1940, making an amendment to the retirement law for the Police and Fire Departments, District of Columbia.

That Sergeant Thomas F. Quinlan of the White House Police Force, is hereby granted relief in the sum of \$114.58 per month payable from the Police and Firemen's Relief Fund, D. C., to take effect on and after August 1, 1942.

By order of the Board of Commissioners, D. C.

/s/ G. M. Thornett
Secretary to the Board.

Official copy furnished
Auditor
G.A.O.
Dis. O
P.D.
White House Police Force
Thomas F. Quinlan

35 Filed Apr 1 1953 Harry M. Hull, Clerk

3rd Precinct

METROPOLITAN POLICE DEPARTMENT

C O P Y

Washington, D. C. May 29, 1938

To Captain Arthur E. Miller,
Commanding Third Precinct.

Sir:—

Pursuant to an Act of Congress dated September 1st, 1936, under section 584 of the District of Columbia Code issued June 30th, 1930, I, Private Jeremiah McCarthy, a member of the Metropolitan Police Force of the District of Columbia, 6th Class, having been appointed July 1st, 1900, and having reached the age of 67 years, I respectfully request that I be retired as of July 1st, 1938.

/s/ Jeremiah McCarthy
Pvt. Jeremiah McCarthy
Third Precinct.

C O P Y

36 Filed Apr 1 1953 Harry M. Hull, Clerk

Third Precinct

C O P Y

METROPOLITAN POLICE DEPARTMENT

Washington, D. C.

May 28, 1938

To the Major and Superintendent

Through the Supervising Inspector, First District

Inviting attention to the attached request of Private Jeremiah McCarthy, in which he requests that he be retired on and after July 1, 1938.

Private McCarthy has been a very faithful public servant. He has been and still is a credit to the department. He has always been interested in his work; is very respectful, cooperative, thoroughly honest and trustworthy, and is well liked. After serving 38 years in the department, he is just as industrious and performs his duties in a satisfactory manner as he did when I first knew him.

It has been a pleasure to have known and worked with Private McCarthy, and I feel sure I express the feelings of the members of this command, as well as others who have been associated with him, that we shall always cherish the memory of our association with him.

While we will lose the services of an energetic and faithful officer, I am glad that Private McCarthy is in a position to take advantage of a privilege accorded him by law, and can enjoy himself in the latter years of his life, and too, which I sincerely trust will be many years of happy retirement.

35 A

I recommend that Private McCarthy's request be granted.

/s/ Arthur E. Miller
Arthur E. Miller
Captain, 3rd Precinct

C O P Y

37 C O P Y

May 28, 1938

MEMORANDUM to Commanding Officer of 3rd Pct.

You will direct Pvt. Jeremiah McCarthy to report to the Board of Surgeons for an examination, 10:30 A.M., May 31, 1938

By direction of the Major and Superintendent:

Lewis I. H. Edwards
Assistant Superintendent,
Executive Officer

E:aa

C O P Y

38 Filed Apr 1 1953 Harry M. Hull, Clerk

C O P Y

May 28, 1938

To the Board of Surgeons, D. C.

Private Jeremiah McCarthy has been directed to report to the Board of Surgeons, 10:30 A.M., May 31, 1938, for an examination.

You will please submit report as to his physical condition.

By direction of the Major and Superintendent:

Lewis I. H. Edwards
Assistant Superintendent
Executive Officer.

E:aa

36 A

39 Filed Apr 1 1953 Harry M. Hull, Clerk

PD 302

C O P Y

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Metropolitan Police Department
Washington, D. C.

Board of Police and Fire Surgeons

Medical Survey Report On:.....Jeremiah McCarthy....N..
Date of Birth.....8/16/70.....Date Appointed.....7/1/00.....
Age Last Birthday.....67.....
Present Assignment.....Station Clerk.....General....O.K.....
Mentality.....O. K.....Weight.....190.....Height.....5' 8½".....
Ishihara.....Vision R.20/100 L.20/100 corrected 20/50 Both
Hearing O. K.....Heart.....O. K.....
Teeth Bad.....Tonsils.....O. K.....
Kidneys O. K.....Skin.....Clear.....
Wasserman.....Blood Pressure.....145/85.....
Digestion O. K.....Organs of Respiration.....O. K.....
Muscles and Articulations.....O. K.....
Findings and Recommendations:.....Age and Service.....
.....Refer to Retiring Board.....

Respectfully submitted,

Board of Police and Fire Surgeons

By /s/ John A. Reed
Secretary

37 A

Date: May 10, 38

C O P Y

40 Filed Apr 1 1953 Harry M. Hull, Clerk

P.D. 18.2569

CO #365-714

C O P Y

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Executive Office

Washington

June 3, 1938

ORDERED:

That Pvt. Jeremiah McCarthy of the Metropolitan Police Force, D. C., having reached the age of 67 years, and having served continuously in the Police Department for over 37 years, is hereby retired, effective from and after June 30, 1938, on authority granted the Commissioners by Act of Congress, approved September 1, 1916, making a retirement law for the Police and Fire Departments, D. C.

That Pvt. Jeremiah McCarthy of the Metropolitan Police Force, is hereby granted relief in the sum of \$100.00 per month, payable from the Policemen and Firemen's Relief Fund, D. C., effective on and after July 1, 1938.

By order of the Board of Commissioners, D. C.

/s/ G. M. Thornett

Secretary to the Board

Official copy furnished:

Auditor

G.A.O.

Dis. O.

P.D.

Pvt. Jeremiah McCarthy

C O P Y

* * * *

41 Filed Apr 1 1953 Harry M. Hull, Clerk

*Affidavit of Inspector Hobart W. Francis in Support of
Motion for Summary Judgment in Behalf of Defendants*

DISTRICT OF COLUMBIA, ss:

Personally appeared Hobart W. Francis who, being first duly sworn, upon his oath deposes and says:

I am Inspector of the White House Police and, as such, have in my custody files containing carbon copies of original records of retired members of the White House Police, originals of which said carbon copies are, for security reasons, stored in the mid-western part of the United States by the United States Secret Service. Attached hereto are photostatic copies of said carbon copies from the file of retired Sergeant Thomas F. Quinlan as follows:

1. Memorandum dated January 27, 1941 from Captain Marcey, former captain of White House Police, to Col. Starling, former Secret Service officer-in-charge, recommending promotion and later retirement of Sergeant Quinlan.

2. Letter dated May 28, 1942 from Captain Marcey to Supervising Agent Reilly of the Secret Service relative to annual leave and retirement of Sergeant Quinlan.

3. Letter dated July 8, 1942 from Sergeant Quinlan to Captain Marcey cancelling war bond deductions.

4. Letter dated July 25, 1942 from Sergeant Quinlan to Captain Marcey authorizing forfeiture of leave.

5. Memorandum dated April 7, 1943 from Captain Marcey to Supervising Agent Reilly transmitting efficiency ratings, etc. of Sergeant Quinlan.

42 Originals of the above described papers, if needed, can be returned from their depository and produced within 7 to 10 days.

/s/ Hobart W. Francis

Subscribed and sworn to before me this 1st day of April, 1953.

/s/ Adam W. Giebel
Notary Public, D. C.

43

January 27, 1941

White House District

White House Police

Memorandum to Colonel E. W. Starling,

Supervising Agent,
White House District.

SUBJECT: Promotion and retirement of Patrolman
Thomas E. Quinlan, White House Police.

I respectfully recommend that Private Thomas F. Quinlan, White House Police, be promoted to the rank of sergeant effective on and after February 1, 1941, vice Sergeant R. G. Ford, who is being retired for physical disability as of February 1, 1941.

As Patrolman Quinlan is sixty-one years of age, and has been in the police service for thirty-four years, I further recommend that he be retired from the service, effective on and after July 1, 1941.

Herbert L. Marcey,
Captain,
White House Police,
Commanding.

APPROVED:

E. W. Starling,
Supervising Agent,
White House District.

May 28, 1942

Captain H. L. Marcey Supervising Agent Reilly
Sergeant T. F. Quinlan

Sergeant T. F. Quinlan of my command carried over from 1941 23 days of annual leave. To date for the year 1942 he has accumulated 10 days, on May 14, 1942 he went on leave for two days, which leaves a total balance of 31 days. Sergeant Quinlan has to his credit on the overtime book 12 days.

With the above amount of annual leave and overtime to Sergeant Quinlan's credit, the earliest date that he can be retired from the White House police force is the last day of July 1942. To get all of the annual leave and overtime due him he would have to go on leave June 6, 1942.

Herbert L. Marcey
Captain

HLM/w

July 8, 1942

White House Police
Captain H. L. Marcey,
Commanding,
White House Police.

Sir:—

This is the second request for cancellation of my authorization for deduction from my pay for the purpose of buying war bonds.

This request is made due to the fact of my pending retirement, and I also request that the amount of my authorization, in the sum of twelve dollars and fifty cents (\$12.50) which was deducted for the pay period

41 A

ending July 8, 1942 also be refunded at the earliest possible moment.

Thank you for your cooperation in this matter.

Thomas F. Quinlan,
Sergeant,
White House Police.

APPROVED:

H. L. Marcey
Captain

46

July 25, 1942

White House District
White House Police
Captain Herbert L. Marcey,
Commanding,
White House Police.

Sir:—

Due to the fact that I am accepting a position to which I can not transfer any annual leave due me after my retirement, and since I will have seven days leave and three days-off due me on the first of August for which I will not be paid, a total of ten days, I offer this letter as authorization of forfeit of the ten days just mentioned, in the event my retirement becomes effective on that date.

Respectfully submitted ,

Thomas F. Quinlan,
Sergeant,
White House Police.

TFQ/wh

47

April 7, 1943

Captain Herbert L. Marcey
 Supervising Agent M. F. Reilly
 Thomas F. Quinlan

Attached you will find completed form from U. S. Naval Hospital regarding Sergeant Thomas F. Quinlan (Retired) regarding efficiency rating, date of rating, and his leave as of the date separated from this force.

Herbert L. Marcey
 Captain

HLM/w

• • • •

48 Filed Apr 1 1953 Harry M. Hull, Clerk

Supplemental Affidavit of Melvin R. Oliveri in Support of Motion for Summary Judgment in Favor of Defendants

DISTRICT OF COLUMBIA, ss:

Personally appeared Melvin R. Oliveri who, being first duly sworn, upon his oath deposes and says:

I am a civilian employee in the Fire Department of the District of Columbia, assigned as Fire Department Secretary to the Police and Firemen's Retiring and Relief Board and have access to and am familiar with the pension and payroll files of the Fire Department of the District of Columbia. I have examined such files with reference to one W. L. McMahon and one H. A. Chapman referred to in the affidavit of Webster R. Frye appended as Exhibit A to the plaintiffs' motion for summary judgment. Attached hereto and made a part hereof by reference are copies of the original applications for retirement filed with the Fire Department of the District of Columbia by the said Chapman and McMahon which I certify

to be true copies of the originals contained in the pension files of said individuals.

I have examined the records of the Fire Department of the District of Columbia and find that, as a result of the applications, copies of which are appended hereto, H. A. Chapman, then a Battalion Chief, retired from the Fire Department effective July 1, 1941, and W. L. McMahon, then a Battalion Chief, retired effective as of August 1, 1945.

And further deponent sayeth not.

/s/ Melvin R. Oliveri
MELVIN R. OLIVERI

Subscribed and sworn to before me this 30th day of March, 1953.

/s/ Adam A. Giebel
Notary Public, D. C.

49 Filed April 1 1953 Harry M. Hull, Clerk

DISTRICT OF COLUMBIA FIRE DEPARTMENT
HEADQUARTERS FIRST BATTALION CHIEFS.

June 12, 1941.

To Chief Engineer:
Fire Department, D. C.

Having passed the age of fifty five and having served thirty six years as a member of the D. C. Fire Department, I respectfully request to be placed on the retired list and granted such pension as may be due me.

Said retirement to take effect July 1, 1941.

/s/ H. A. Chapman
H. A. Chapman,
Battalion Chief.

COPY

50 Filed Apr 1 1953 Harry M. Hull, Clerk
COPY

Headquarters of Fifth Battalion Chief
District of Columbia Fire Department.

July 3rd, 1945.

Chief Engineer,
D. C. Fire Department.

This is a very difficult letter for me to write first because of our long friendship and splendid relations during all of these years and also because I was under the impression that I was rendering splendid service to the fire department by the way in which I thought that I have carried out the many difficult tasks during these years.

By tendering my request for retirement from the department effective midnight of July 31. 1945 I am only following out a policy adopted by me when I was appointed a member of the department thirty five years ago this July 1st.

That is to say, if at any time my superior thought that owing to the condition of my health that I was unable to perform the duties of my office or any other office in the proper manner I would ask for retirement.

When I visited your office on February 1st in regards to being eliminated for the position of acting Deputy Chief your excuse then was that your reason for doing so was you was looking out for my health but at that time I really was feeling in the best of health.

Now I have reached a point where it would not in my mind be justice to the department to remain any longer.

I assure you that it is regret that I have come to this conclusion.

/s/ W. L. McMahon
5th B. C.

* * * *

51 Filed Apr 17, 1953 Harry M. Hull, Clerk

*Affidavit of Irving Wilner in Support of Motion for
Summary Judgment*

Irving Wilner, first being duly sworn, upon oath deposes and says that he is one of counsel for the plaintiff in the above-entitled cause, and that he is familiar with the various proceedings which have taken place in connection with the present litigation, and that the following represents a record of various actions taken in connection therewith:

Joseph B. Simms, petitioner, v. Commissioner of Internal Revenue, respondent, was filed in the Tax Court of the United States, Docket Number 23728, during or about the month of June, 1949. Decision in the above case promulgated on July 11, 1951.

Petition for review filed with the U. S. Court of Appeals for the District of Columbia on October 9, 1951.

Formal request made to the Commissioners of the District of Columbia for change in retirement status of plaintiff herein on February 6, 1952.

Court of Appeals affirmed decision of Tax Court on April 3, 1952.

Hearing before the Commissioners, District of Columbia, on October 9, 1952.

52 Decision of the Board of Commissioners, District of Columbia, disallowing the petition filed by the plaintiff herein.

/s/ Irving Wilner
Irving Wilner

Subscribed and sworn to before me this seventeenth day of April, 1953.

/s/ Nettie C. Jones
Notary Public

My commission expires March 31, 1958

53 Filed Apr 20 1953 Harry M. Hull, Clerk

Order

Upon consideration of the motion of the defendants for summary judgment in their favor, of the motion of the plaintiffs for summary judgment in their favor, of the affidavits and exhibits annexed to each, of the points and authorities in support of and in opposition of each motion, and of the arguments of counsel in open court, and it appearing to the court that there is no genuine issue as to any material fact in the above-entitled cause and that the defendants are entitled to judgment on the merits, it is, by the court, this 20 day of April, 1953,

ORDERED:

1. That the motion of the plaintiffs for summary judgment in their favor be, and it is hereby, denied.
2. That the motion of the defendants for summary judgment in their favor be, and it is hereby, granted.
3. That judgment be, and it is hereby, entered in favor of the defendants, and plaintiff Joseph W. Allen is ordered to pay the costs of this action.

/s/ Alexander Holtzoff
JUDGE

Seen:

Seegmiller, Murdock and Wilner
by /s/ Irving Wilner
Attorneys for Plaintiff

• • • •

54 Filed May 13 1953 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this 11th day of May, 1953, that

JOSEPH W. ALLEN, et al

hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of April, 1953 in favor of F. JOSEPH DONOHUE, et al, D. C. Commissioners against said JOSEPH W. ALLEN, et al.

/s/ Irving Wilner

Attorney for Plaintiffs

• • • •

BRIEF FOR APPELLEES

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 11,837

FILED OCT 12 1953

JOSEPH W. ALLEN, ET AL., *Appellants,*

Joseph W. Allen
CLERK

v.

SAMUEL SPENCER, RENAH F. CAMALIER, LOUIS W. PRENTISS,
Appellees.

Appeal from the United States District Court for the
District of Columbia

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
*Principal Assistant Corporation
Counsel, D. C.,*
MILTON D. KORMAN,
Assistant Corporation Counsel, D. C.,
Attorneys for Appellees,
District Building,
Washington 4, D. C.

STATEMENT OF QUESTION PRESENTED

In the opinion of the appellees, the question presented is:

Whether 60 former members of the Police and Fire Departments of the District of Columbia who, under the provisions of Sections 4-507 and 4-508, D. C. Code, 1951, retired between 1931 and 1947 upon the basis of age and longevity and, since that time, have, without rendering any active service to the two departments, received and accepted from the District the maximum retirement benefits permitted by law, may, in order to avoid the effect of a decision by this Court that such retirement benefits are subject to Federal income tax, take the position in 1953 that the orders retiring them and granting them retirement benefits are "illegal and invalid" and demand that they be now retired for disabilities with which they were allegedly suffering at the time of retirement.

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CASES CITED

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<i>Wunderle v. Kimball, Secretary of the Navy</i> , 91 U. S. App. D. C. 394, 201 F. 2d 707	20

STATUTED CITED

Act of September 1, 1916, 39 Stat. 718, ch. 433, Sec. 12	4-6, 8, 11, 13, 14
Act of October 14, 1940, 54 Stat. 1118, ch. 860	4, 6-8, 11
District of Columbia Code, 1951 Edition:	
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MISCELLANEOUS CITATIONS

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,837

JOSEPH W. ALLEN, ET AL., *Appellants,*

v.

SAMUEL SPENCER, RENAH F. CAMALIER, LOUIS W. PRENTISS,
Appellees.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia entered April 20, 1953 for summary judgment in favor of the appellees (defendants below) in an action for declaratory judgment and for mandatory injunction (App. 46). On the 11th day of May, 1953 the appellants (plaintiffs below) filed a Notice of Appeal from the judgment of the District Court (App. 47). This Court has jurisdiction under Title 28, U. S. Code Revised, Section 1291.

COUNTER STATEMENT OF THE CASE

Of the 61 appellants, 16 were formerly members of the Police Department of the District of Columbia and the remaining 45 were members of the Fire Department of the District. Appellant Addison retired from the Police Department in 1933 for disability incurred in line of duty. The other 15 former policemen retired from that department on various dates between 1932 and 1947 under the provisions of Secs. 4-507 and 4-508, D. C. Code, 1951, on the basis of their age and length of service, some at their own request after passing the minimum age and length of service for retirement and others upon reaching the maximum limit when retirement is required. The 45 former firemen were all retired between 1931 and 1947 on the same basis, i. e., some at their own request after passing the minimum age and length of service and others upon reaching the maximum age limit when retirement is mandatory (App. 11-14). Each of the appellants was, in accordance with the said code provisions and orders of the Commissioners of the District, granted as retirement compensation 50% of the amount of salary he received as an active member of the department and has, since that time, also received any increases therein provided for by law. Since the effective date of said retirements none of the appellants has performed any active duty in these departments of the District Government (App. 11-14).

Members of the Police and Fire Departments may be retired:

1. When incapacitated for duty by reason of injury in line of duty.
2. Upon request of a member who has served 25 years or more and has reached the age of 55.
3. In the discretion of the Commissioners after a member has reached the age of 60 years. (By Commissioners' order retirement is mandatory at age 64.)

By law and by practice those retiring under the second and third categories have always received the maximum retirement benefit of 50% of their active pay. Those retiring under the first category may and do receive less than the maximum retirement benefit. Because of this fact and of the further fact that retirement based on physical disability was once thought to carry with it some stigma and reduce the chances of the retired member for other employment, prior to June of 1947 almost all policemen and firemen sought retirement on the basis of age and length of service rather than on disability (App. 14-16 and 25).

After the decision by Judge David A. Pine of the case of *Frye v. United States*, 72 F. Supp. 405, in which it was held that retirement benefits based on physical disability are not subject to Federal income tax, practically all members of the Police and Fire Departments sought retirement on that basis rather than on the basis of age and longevity. App. 16). Also subsequent to the decision in the *Frye* case, *supra*, orders were issued by the Commissioners in the case of each appellant setting forth, essentially, that at the time of retirement he was suffering from physical disabilities incurred in the line of duty to such an extent that, had he not been retired when he was for age (or, on his request, for age and length of service), he would have been retired for physical disability incurred in the line of active duty (App. 14).

Appellants, on October 9, 1952, petitioned the Commissioners of the District of Columbia to reconsider their retirements, to send their cases before the Retiring and Relief Board as provided in Section 4-510 of the Code to determine whether their retirements should have been for disability and, if so, the degree of disability, and to enter new retirement orders for them retroactively effective to the date of their actual retirements. The Commissioners denied this request (App. 4).

After argument on cross-motions for summary judgment filed herein with supporting affidavits appended to each by the appellants and the appellees, the United States District Court for the District of Columbia denied appellants' motion, granted appellees' motion, and entered final judgment in favor of the appellees (App. 46).

STATUTES INVOLVED

The statutes involved in this appeal are a portion of the Act approved September 1, 1916 entitled "An Act Making Appropriations to provide for the expenses of the Government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred seventeen, and for other purposes." 39 Stat. 718, ch. 433, § 12, (Sections 4-507 and 4-510, D. C. Code, 1951), and the Act approved October 14, 1940 entitled "An Act To provide for the retirement of certain members of the Metropolitan Police Department of the District of Columbia, the United States Park Police force, the White House Police force and the members of the Fire Department of the District of Columbia." 54 Stat. 1118, ch. 860, (Section 4-508, D. C. Code, 1951).

The relevant portions of the first of these statutes are as follows:

Sec. 12 * * *

"Whenever any member of the police department or the fire department of the District of Columbia shall become so permanently disabled through injury received or disease contracted in the line of duty as to incapacitate him for the performance of duty, or, having served not less than twenty-five years and having reached the age of fifty-five years shall, for any cause, become so permanently disabled as to incapacitate him for the performance of duty and shall make written application therefor and said application shall be approved by the Commissioners of said District, or, having reached the age of sixty years, in the discretion of the said commissioners, he shall in either event

be retired from the service thereof and be entitled to receive relief from the said policemen and firemen's relief fund, District of Columbia, in an amount not to exceed fifty per centum per year of the salary received by him at the date of retirement. * * *

"There is created in and for the District of Columbia a board to be known as the police and firemen's retiring and relief board, to be composed of the corporation counsel of said District and one member from each the police department and fire department, to be designated by the said commissioners, and the said commissioners are authorized to change the personnel of said board from time to time, in their discretion, and they are further authorized and empowered to make, modify, and to amend from time to time regulations and rules of procedure for the conduct of the said board. The said board shall consider all cases for the retirement and relief of members of the police department and the fire department rendered necessary or expedient under the provisions of this Act, and all applications for the relief of widows and children under sixteen years of age. In every case of retirement of a member of either of said departments the board of police and fire surgeons shall certify, in writing, to the said retiring and relief board the physical condition of the member for whom retirement and relief is sought. The said retiring and relief board shall give written notice to any member of said departments under consideration by it for retirement and relief to appear before the board and give such evidence under oath as he may desire, and the proceedings of the board shall be reduced to writing and shall show the date of appointment of such member, his age, his record in the service, and any other information that may be pertinent to the matter of his retirement and relief. The said board is authorized and empowered to summon any person before it to give testimony, under oath or affirmation, as to any matter affecting retirement and relief under the provisions of this

Act; and any member of the board shall have power to administer oaths or affirmations to witnesses appearing before the said board. Such summons shall be served by any member of the Metropolitan police force, and upon the refusal or neglect of a witness to appear before the said board or to testify when required, he or she may be compelled to attend and testify as provided in the Act of February twentieth, eighteen hundred and ninety-six, entitled 'An Act to amend an Act entitled, "An Act to punish false swearing before trial boards of the Metropolitan police force and fire department of the District of Columbia, and for other purposes," approved May eleventh, eighteen hundred and ninety-two,' and any witness knowingly making a false statement to the said board on any material matter shall be guilty of perjury and punishable accordingly. The said retiring and relief board shall in each case considered by it for retirement and relief submit to the Commissioners of the District of Columbia a report of its findings, and the said commissioners shall have power to approve, disapprove, or modify such findings or to remand any case for such further proceedings as they may deem necessary. * * *

"Approved, September 1, 1916."

The second statute above referred to is the following:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 12 of the Act entitled 'An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes', approved September 1, 1916, is amended by adding after the fourth paragraph of such section a new paragraph to read as follows:

"Whenever any member of the Metropolitan Police Department of the District of Columbia, or of the United States Park Police force, or of the White House Police

force, or the Fire Department of the District of Columbia has served twenty-five years or more as a member of such department or police force, or the Fire Department of the District of Columbia, or any combination of such service, or whenever any member of the United States Secret Service, who has served twenty-five years in the service of the United States Government, the duties of whom in whole or in part related to the protection of the life of the President and who has actively performed duties other than clerical for ten years or more directly related to the protection of the President extended by the Secret Service Division and having reached the age of fifty-five years, he may, at his election, be retired from the service of any such police department or police force or Division or fire department, and shall be entitled to receive retirement compensation from the said policemen and firemen's relief fund, District of Columbia, in an amount equal to 50 per centum per annum of the salary received by him at the date of retirement: *Provided, however,* That in any fiscal year any such retirement shall be in accordance with such rules and regulations as may be adopted by the Commissioners of the District of Columbia, and in no fiscal year shall the amount of all such retirements authorized under the provisions of this paragraph aggregate more than \$30,000: *Provided further,* That, when any member of the United States Secret Service Division shall have performed service in connection with the protection of the President for ten years or more, thereby becoming subject to future retirement after twenty-five years' service under the provisions of this Act, that he shall be authorized to transfer all funds to his credit in the United States Civil Service Retirement Fund to the Policemen and Firemen's Relief Fund of the District of Columbia, and that after the transfer of such funds, the salary of that member shall be subject to the same deductions for credit to the Policemen and Firemen's Relief Fund of the District of Columbia as the deductions from salaries of other members

contributing to that fund, and he shall be entitled to the same benefits as other members contributing to that fund.

"Approved, October 14, 1940."

SUMMARY OF ARGUMENT

This is a suit to compel the Commissioners of the District of Columbia to retire, retroactively, some 61 policemen and firemen on the grounds of physical disability. The said firemen and policemen were heretofore retired at various times from six to twenty-two years ago, some at their own request upon reaching the minimum age and having the minimum service required, and some by the Commissioners when they reached the maximum age permitted. All of the appellants acquired in the original orders whereunder they were retired and whereunder they received the maximum retirement benefits provided by law. Although they contend that the orders retiring them were "illegal and invalid", they accepted the retirement benefits throughout the period of their retirements, gave no active service therefor, and have made no tender of the return of the thousands of dollars they have received. Accordingly, the appellees contend that the appellants are barred under the equitable doctrine of estoppel from asserting, at this late date, that the orders under which they retired are illegal.

Wholly aside from the fact that the contention cannot be established because it is barred by estoppel, examination of the law and of the surrounding facts establishes that the orders retiring the 61 appellants were entirely valid and that the appellants are contesting the same, not because of invalidity, but because of a decision of this Court holding that retirement benefits received as a result of retirement for age or age and length of service are subject to Federal income tax. A proper reading of the Act of September 1, 1916 (Section 4-510 D. C. Code, 1951), demonstrates that, contrary to the contention of appellants, Congress did not intend that all cases of retirement should be processed by the Retiring and Relief Board.

The Commissioners of the District, having issued valid orders retiring the sixty-one appellants from the Police and Fire Departments are wholly without power to issue new orders changing the basis of retirement of the appellants.

Since the appellants were retired from the District Government service from six to twenty-two years ago, and the record discloses that appellants were aware as far back as 1944 of alleged deficiencies in the retirement procedures and of the effect thereof, their failure until 1953 to bring an action seeking redress makes them guilty of laches.

ARGUMENT

I

Appellants, having acquiesced in the proceedings leading to their retirement and having accepted the benefits resulting therefrom, are estopped from questioning the legality of such proceedings.

The complaint filed in the District Court (App. 2-8) is entitled "*Complaint for Illegal Retirement*". The essential prayers thereof are, firstly, that the orders of the appellee Commissioners of the District of Columbia retiring the 61 appellants from the Police and Fire Departments of the District be declared "illegal and invalid", and, secondly, that the appellee Commissioners of the District be ordered to reconsider the retirement rights of each of the appellants in accordance with law and enter a proper retirement order as a result of such reconsideration.

In paragraph 3 of the complaint it is alleged that the appellants were formerly members of the Fire Department or Police Department of the District of Columbia and, with regard to each appellant, "the Commissioners of the District of Columbia have heretofore entered an order retiring him for age and length of service".

The affidavits of Lowell A. Goad and Melvin R. Oliveri (App. 11-14), attached to the appellees' motion for summary judgment, show that the numerous appellants have

been retired from the two departments of the District of Columbia for many years, some dating back as far as 1931, have not, since retirement, performed any active service in the department from which retired, and have, since their retirements, been regularly receiving the maximum retirement benefits provided by law plus such increases as were afterward provided by law. If the orders by which the appellants were retired from the District Government service were illegal and invalid as they contended below and as they argue here, then each appellant is still an active member of the Fire or Police Department of the District, has failed to serve as such, and has been illegally receiving and accepting retirement benefits regularly for many years.

Nothing in the record shows any offer on the part of the appellants to return to the appellees or to the District of Columbia Government the money thus illegally received by each appellant. It is elementary that he who seeks equity must do equity. 19 Am. Jur. "*Equity*" § 462 p. 319, et seq. and the cases cited. It is also elementary that one cannot accept the fruits of an alleged illegal or invalid transaction or order and subsequently attack its validity. Acceptance and retention of the benefits of a transaction, contract, instrument, regulation or statute which one might have rejected or contested constitute estoppel of one's right to reject or contest. 19 Am. Jur. "*Estoppel*", § 64, p. 682, et seq.; and one who receives and accepts benefits under a rule or order of a commission is bound by the same rule of estoppel, 42 Am. Jur. "*Public Administrative Law*", § 98, p. 427-428.

Moreover, the record is completely silent concerning any objection made by the appellants during the administrative proceedings by which they were retired from the Police Department or the Fire Department of the District, allegedly illegally. In *United States v. Tucker Truck Lines*, 344 U. S. 33, 36-37, 97 L. ed. 4, 73 S. Ct. 67; the Supreme Court said:

"We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

The appropriate time for objection to retirement without physical examination and without all of the other procedures which appellants claim were not followed was at the time of the retirement of each appellant—from six to twenty-two years ago.

II

The statute does not require that all cases of retirement shall be considered by the Board—it is neither necessary nor expedient that the Board consider cases such as those involved.

A study of the two Acts of Congress involved (Act of September 1, 1916, 39 Stat. 719, ch. 433, § 12, and the Act of October 14, 1940, 54 Stat. 1118, ch. 860) shows, what is pointed out in the record (affidavit of Joseph W. Conroy, App. 15, and affidavit of Stephen T. Porter, App. 25), that policemen and firemen retired from the respective departments on account of physical disability may (and many do) receive less than the maximum retirement benefit of 50% of their active pay. On the other hand, members retired on the basis of age or age and longevity always receive the maximum.

Examination of the entire record and of the third point in appellant's brief demonstrates that appellants are not really so much concerned with alleged illegality and invalidity of the orders by which they were retired from the District Government service as they are with obtaining from the appellee Commissioners new orders retiring them for reasons other than those for which they were retired. The basis of retirement set forth in the orders separating the appellants from the District service was entirely satisfactory and acceptable to them at the time of issuance thereof and for many years thereafter. Prior to the decision of the lower court in *Frye v. United States*, 72 F. Supp. 405, separation from the Police or Fire Department on the basis of age or age and length of service rather than for disability was distinctly advantageous to the appellants and was sought by them and others similarly situated.

It is strange that the case of *Simms v. Commissioner of Internal Revenue*, 90 U. S. App. D. C. 322, 196 F. 2d 238, which may be said to be a companion case to the one now before the Court, is not cited in appellants' brief. Simms was identically situated to appellants in this case and sought relief from the payment of Federal income taxes on his retirement compensation. He, subsequent to the decision in the *Frye* case, *supra*, asked for and obtained from the Commissioners of the District of Columbia the same kind of order that was obtained by the appellants herein, i. e., an order reciting that at the time of his retirement he and others "were suffering from physical disabilities which were incurred in the line of duty to such an extent that had they not been retired when they were for age, they would have been retired for physical disability incurred in the line of active Fire Department duty * * *". Undoubtedly, it was assumed that such a finding by the Commissioners, which, of course, does not change the basis of retirement of Simms (or of any of the appellants who obtained similar orders) would be sufficient to avoid the pay-

ment of Federal income taxes on their retirement compensation. When, as a result of the *Simms* decision, this device failed of its purpose, appellants conceived the possibility of having the Commissioners, many years later, retire them for reasons other than those which satisfied them at the time they were retired and under which they were assured of and received the maximum retirement benefits permitted by law. The Commissioners of the District concluded that they are without authority to make such change and appellants sought the intervention of the court below. Compare *Sweet v. Commissioner of Int. Rev.* (CCA 1) 120 F. 2d 77.

In the *Frye* case, Judge Pine of the District Court correctly set forth, at p. 407 of the opinion, the three categories under which a member of the Police or Fire Departments may be retired, as follows:

"1. A member so permanently disabled through injury received or disease contracted in line of duty as to incapacitate him for the performance of his duty. Sec. 4-507.

"2. A member having served 25 years or more and having reached the age of 55, at his election. Sec. 4-508.

"3. A member having reached the age of 60 years, in the discretion of the Commissioners of the District of Columbia. Sec. 4-507."

Judge Pine thereupon analyzed the provisions of the Act of September 1, 1916, as embodied in Section 4-510 of the Code and upon which appellants so strongly rely, and concluded, with regard thereto, on p. 408 of his opinion:

"* * * While this section requires the Board to consider 'all cases' for retirement and relief, it obviously has no application to cases in the second category under existing requirements thereof as above set forth."

The "existing requirements" referred to are that the retiring member retires as a result of his own application

upon the basis of age and length of service and is therefore entitled to the maximum compensation. His physical condition, therefore, has no bearing on the amount he shall receive. The record herein demonstrates (App. 15, and 16-17) that those members who retire by compulsion upon reaching the maximum age limit also receive the maximum retirement compensation, and, accordingly, their physical condition is irrelevant.

Appellants, to support their argument that the Act of September 1, 1916 requires that all cases of retirement shall be processed by the Retirement Board and that certain other procedures shall be complied with, on page five of their brief quote a portion of Section 4-510 of the Code and emphasize certain words therein by printing them in italics. Appellees submit that the emphasis is wrongly placed. Two particularly pertinent sentences are the first and the last of those quoted. For convenience, appellees repeat the first and last sentences with the emphasis as set forth on page five of appellants brief, and, immediately below them, the same two sentences with emphasis properly supplied in capital letters:

“The said board shall consider *all cases* for the retirement and relief of members of the police department and the fire department rendered necessary or expedient under the provisions of sections 4-501, 4-503, 4-506 to 4-510, 4-512 to 4-514, and *all* applications for the relief of widows, and children under sixteen years of age.

* * * * *

The said retiring and relief board *shall in each case* considered by it for retirement and relief submit to the commissioners of the District of Columbia a report of the findings, and the said commissioners shall have power to approve, disapprove, or modify such findings or to remand any case for further proceedings as they may deem necessary.”

"The said board shall consider ALL CASES FOR the RETIREMENT AND RELIEF OF MEMBERS of the police department and the fire department RENDERED NECESSARY OR EXPEDIENT under the provisions of sections 4-501, 4-503, 4-506 to 4-510, 4-512 to 4-514, and ALL APPLICATIONS FOR the RELIEF OF WIDOWS, AND CHILDREN under sixteen years of age.

* * * * *

The said retiring and relief board shall IN EACH CASE CONSIDERED BY IT for retirement and relief submit to the commissioners of the District of Columbia a report of the findings, and the said commissioners shall have power to approve, disapprove, or modify such findings or to remand any case for further proceedings as they may deem necessary."

It is an elementary rule of statutory construction that "effect must be given, if possible, to every word, clause and sentence of a statute". 1 *Kent's Comm.* (13th Edition 1884) 462. Well recognized principles of statutory construction also require that no part of a statute will be deemed inoperative, superfluous, void or insignificant. J. C. Sutherland, *Statutes and Statutory Construction*, 3rd Edition, (1943) Vol. 2, p. 339; 50 *Am. Jur.* 456. It should not be presumed that any provision of a statute is redundant; to the contrary, it is to be presumed that one paragraph or word or phrase of a statute is not a needless repetition of another. A construction of a statute should be avoided which would render a part of a statute superfluous, or which would give to a particular word or phrase the same meaning as the word or phrase preceding it, so that the latter adds nothing to the statute. 50 *Am. Jur.* 364.

Congress must have used the words "rendered necessary or expedient" with some purpose. The obvious purpose was to indicate that *some* cases of retirement and relief of members of the Police and Fire Departments are *not* neces-

sary or expedient to be considered by the Board. And the ones not necessary to be considered by the Board can be none other than those in which the retired member is to receive the maximum amount of retirement compensation without regard to other considerations. The language of the last sentence of Section 4-510 of the Code emphasizes that all cases were not to be processed by the Board. Thereby it is required that the Board shall report to the Commissioners not in every case, but only "*in each case considered by it*". Accordingly, there was no necessity that retirements on the basis of age or age and longevity should have been processed as provided for in Section 4-510 of the Code and the orders retiring the appellants from active District service with maximum retirement compensation were and are fully valid.

III

The Appellees are wholly without statutory authority to change the orders under which the Appellants were retired.

If, contrary to the position of the appellant, and as appears to be the case, the retirement orders by which the sixty appellants were retired from the Police and Fire Departments of the District were not completely invalid, the Commissioners of the District do not have the power to issue new orders upon the same subject and, accordingly, the lower court does not have the power to order them so to do.

In the case of *Garfield v. Goldsby*, 30 App. D. C. 177, (affirmed 211 U. S. 249, 53 L. ed. 168, 29 S. Ct. 62) the Court said:

"It is equally well settled, on the other hand, that, when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, unless power to that extent has also been conferred upon him."

The case of *United States v. Corson*, 114 U. S. 619, 29 L. ed. 254, 5 S. Ct. 1158, is decisive of the question here presented. Therein it appears that President Lincoln, on March 27, 1865, entered an order dismissing an officer from the Army. The vacancy thus created was not filled. On June 19, following, President Johnson entered another order revoking the order of dismissal and restoring the officer to his position. The officer then brought suit in the Court of Claims for his salary for the period between March 27 and June 19, 1865. The Supreme Court held the order of revocation a nullity, saying:

"In view of these adjudications, it is not to be doubted that the effect of the order of March 27, 1865, dismissing appellee from the service, was to sever his relations with the Army. Thenceforward and until, in some lawful way, again appointed, he was disconnected from that branch of the public service as completely as if he had never been an officer of the Army. So that, his right to pay, as captain and assistant quartermaster of volunteers, from the date of his dismissal from the service by President Lincoln to the date of the order of President Johnson, depends entirely upon the question whether an officer of the Army, once lawfully dismissed from the service, can regain his position and become entitled to its emoluments by means of a subsequent order revoking the order of dismissal and restoring him to his former position.

"This question must be answered in the negative upon the authority of *Mimmack v. U. S.*, 97 U. S. 436 (Bk. 24, L. ed. 1069). The death of the incumbent could not more certainly have made a vacancy than was created by President Lincoln's order of dismissal from the service. And such vacancy could only have been filled by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate were necessary; unless the vacancy occurred in the recess of that body, in which case the President

could have granted a commission, to expire at the end of its next succeeding session. Const., art. II, par. 2."

In the case of *Mimmack v. United States*, 97 U. S. 426, 24 L. ed. 1067, referred to in the foregoing quotation, an officer of the Army had resigned and the resignation had been accepted by the President. Thereafter the President revoked his acceptance and ordered the officer to duty. The officer brought suit for his salary and the Supreme Court of the United States held "that the subsequent action of the President did not restore the petitioner to the military service, and that his claim was rightly rejected."

There are instances in which the Congress has acknowledged the lack of authority of the Commissioners to change an order. In 1929 one George M. Nicholson was removed from the police force after a trial board action. In 1934 Officers Ralph S. Warner and David R. Thompson were likewise removed from the police force after trial board proceedings. When it was later determined in each case that these dismissals were unwarranted because of perjured testimony of the complaining witnesses, the Commissioners concluded that they were without authority to restore these officers to the police force. They were subsequently restored to the force by congressional action,¹ which not only tacitly acknowledged that an Act of Congress was required to accomplish a change in the Commissioners' final order, but the proposition was specifically stated on the floor of the House of Representatives. *Congressional Record*, Vol. 84, Pt. 2, p. 1938.

IV

The Appellants were guilty of Laches and, therefore, this action is not maintainable.

Not only was the action filed below barred by the doctrine of estoppel as pointed out in Point I hereof, it was not

¹ 47 Stat. 1727, ch. 102; 53 Stat. 1443.

maintainable under another equitable doctrine. While appellants attempt to avoid the force of this doctrine in the third point in their brief, the affidavit of Webster R. Frye, filed by them in support of their motion for summary judgment (App. 18-20), shows that they have been aware of alleged adverse effects of retirement orders based on age and length of service since the year 1944 and were positively advised that their retirement benefits might be subject to Federal income tax as far back as March 14, 1949. Notwithstanding, they took no action to protect their alleged rights until the filing of this case below in 1953.

Appellants contend that the delays in bringing the action has not prejudiced the appellees in any manner. It is immediately apparent that they have made no showing that the percentage of disability at the time of retirement of the sixty appellants can, at this late date, be established. That burden was upon them. The degree of disability of the retirees *at the time of retirement* is the critical point that cannot be established six to twenty-two years after the event.

Moreover, the passage of time alone is sufficient, it has been held by this Court in an analogous situation, to constitute laches. In *United States ex rel Greylock Mills v. Blair, Commissioner*, 54 App. D. C. 27, 293 F. 846, this Court held that an application for mandamus is controlled by equitable principles including the doctrine of laches, and that where a different basis of calculating income taxes was advantageous to the appellant and a change of the annual basis on which he reported his tax was desirable, "it was the duty of appellant, within a reasonable time, to invoke the discretion of the Commissioner of Internal Revenue, if a change to a calendar year basis was desired."

It is obvious that, depending on the date of his retirement from the Police or Fire Department of the District, this action, if maintainable on other grounds, could have been brought by the appellants from six years to twenty-two

years prior to the date of its filing. Under the circumstances it is barred by the doctrine of laches. The most nearly analogous cases are those involving removal from public employment by dismissal. Both local and state cases hold that actions seeking equitable intervention because of alleged impropriety of the dismissal order must be promptly brought. Delays of even a few months have been held to constitute laches.

U. S. ex rel Arant v. Lane, 47 App. D. C. 336; aff. 249 U. S. 367, 63 L. ed. 650, 39 S. Ct. 293.

Caswell v. Morgenthau, 69 App. D. C. 15, 98 F. 2d 296.

U. S. ex rel Cromwell v. Doyle, 69 App. D. C. 215, 99 F. 2d 448.

People ex rel McCoy v. McCahey, 296 Ill. App. 310, 15 N. E. 2d 988.

Glori v. Board of Police Commissioners of Newark, 72 N. J. Law 131, 60 A. 47.

Oliver v. New Jersey State Highway Commission, 9 N. J. Misc. 186, 153 A. 251.

DeStefano v. Civil Service Commission, 126 N. J. Law 121, 18 A. 2d 621.

Weston v. Williams, 190 S. C. 112, 2 S. E. 2d 381.

Hopkins v. Ames, 334 Ill. 527, 176 N. E. 729.

Oddly enough, the latest pronouncement by this Court is in *Wunderle v. Kimball, Secretary of the Navy*, 91 U. S. App. D. C. 394, 201 F. 2d 707, in which counsel for the appellant were the same as those representing appellants herein. In a per curiam opinion, citing *Grasse v. Snyder*, 89 U. S. App. D. C. 352, 192 F. 2d 35, and, in the margin, *Baxter v. Pace*, 89 U. S. App. D. C. 392, 193 F. 2d 20, the Court said:

“Appellant was removed from employment in the classified civil service of the United States on July 11, 1941. At her request she was furnished a brief statement which purported to inform her of

the reasons for her removal. Repeatedly thereafter she wrote various officials in the Navy Department, seeking reinstatement. On October 12, 1942, she was advised by the Assistant Secretary that the entire file had been reviewed and no reason found to warrant a change in the action taken. She continued, by letters addressed to various officials in the Navy Department and other officials, to seek reinstatement. She filed the present action January 23, 1952. The District Court was of opinion, upon the authority of *Grasse v. Snyder*, that the action was barred by laches. We agree with that conclusion."

CONCLUSION

The appellees submit that the appellants were properly and validly retired from the Fire and Police Departments of the District of Columbia, that the appellees are without authority to issue new orders of retirement for the appellants, and that, in any event, appellants are guilty of laches in seeking redress at this late date, and have, by their past conduct, become estopped to contest the validity of the orders retiring them. Accordingly, there was no error on the part of the court below in entering summary judgment in favor of the appellees and the judgment of the lower court should be affirmed.

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